Original

No. 8587-8

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHAS. LUX et al.,

Plaintiffs and Appellants,

vs.

J. B. HAGGIN et al.,

Defendants and Respondents.

BRIEF FOR RESPONDENTS

FLOURNOY, MHOON & FLOURNOY,
Of Counsel for Respondents.

Filed Sept 5th *1883.*

J. W. McCarthy *Clerk.*

By J. Mariano *Deputy Clerk.*

SAN FRANCISCO:
GEO. SPAULDING & CO., GENERAL BOOK AND JOB PRINTERS,
1883.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,
Appellants,

vs.

JAMES B. HAGGIN ET AL.,
Respondents.

No.

The undersigned, of counsel for respondents, respectfully submit that in presenting the following points and authorities and brief argument thereon, they do not propose to exhibit the entire case on behalf of respondents, mindful that other points suggested in the transcript will be fully briefed and argued to the Court by their associates.

Points and Authorities.

I.

The doctrine that the owner of land upon the margin of a flowing stream, has the right incident

to such ownership, that such stream shall continue to flow unaltered in quality and undiminished in quantity, is a doctrine (that was) unknown to the common law of England, but on the contrary the common law was that first in time was first in right as to the uses of the water of a flowing stream, and no action could lie except for a disturbance of actual use under an appropriation previously made. See—

Cox vs. *Mattheues*, 1st Ventris Rep., 237.
10 Johnson, N. Y. Rep., 241.
3d Johns, Ch. Rep., 287.
6th East Rep., 370.
1st Bromwell & Alderson Rep.; 261, *Sanders* vs. *Newman.*
Liggins vs. *Ingl*, 7 Brigham's, 692.
Western vs. *Alden*, 8 Mass. Rep., 136.
Perkins vs. *Dow*, 1st Root's Rep., 537.
Goddard's Law of Easements, pages 251–252.
Blackstone's Com. Book 2, page 14.
Williams vs. *Moreland*, 2 Barnwell & Cresswell, 913.
Blackstone, vol. 2, page 403.

II.

The doctrine of prior appropriation, or "*first in time superior in right*," having been the common

law, became the practice of the earlier American settlers in California and was adopted on 13th of April, 1860, by the Legislature, and has been recognized as necessarily applicable to this Coast in the Supreme Courts of the United States and of this State, and no action can be maintained in California except for the disturbance of an actual use under appropriation previously made. See—

Atchison vs. *Peterson*, 20 Wallace, 511.
Broder vs. *Natoma Water Co.*
Denison vs. *Kirk.*
Basey vs. *Gallagher*, 20 Wallace, 691.
Irwin vs. *Phillips*, 5 Cal., 140.
Butte Canal and Ditch Co. vs. *Vaughn*, 11 Cal., 143.
Ortman vs. *Dixon,* 13 Cal., 33.
Hill vs. *Smith*, 27 Cal., 483.
Yale Mining Claims and Water Rights, 194.
Tartar vs. *Spring Creek Water Mining Co.*, 5 Cal., 397.
Civil Code, Sec. 1422.

Act approved March 29, 1876, concerning water ditches in Fresno, Kern and Tulare Counties.

Sec. 4 and 11, Civil Code, 802.

III.

Plaintiffs claiming rights as riparian owners upon the margin of a flowing stream, must (in or-

der to establish their rights as such) show that their land is upon the margin of a flowing stream, or water course, *i. e.*, upon the margin of a defined channel with banks and bed, and wherein the water had been accustomed (but not necessarily continuously) to usually flow, before diverted by defendants, and that there was such usual flow from the point of such diversion to the bank owned by plaintiffs.

Angel on Watercourses.
Washburne on Easements.
Goddard's Easements and Servitudes.
City of Bangor vs. *Lansil*, 51 Maine, 595.
Ashley vs. *Walcott et al.*, 11 Cushing, 195.
Rawstrom vs. *Taylor*, 11 Exchcq., 367.
Swett vs. *Cutts*, 50 New Hampshire.
Earl vs. *De Hart*, 1st Beasley's Eq.
Curtis vs. *Ayroult*, 47 New York.
Ogburn vs. *Connor*, 46 Cal., has no application.

IV.

If, as appellants claim, they are riparian owners on Buena Vista slough, and that such slough is a watercourse and a continuation of Kern River, and were such riparian owners at the date of the commencement of the Calloway Canal, and had notice of its proposed construction, and remained such owners during its construction up to the time of

filing this action, and knew of its progress towards completion at great costs to respondents, had notice of the proposed diversions of a part of the waters of Kern River thereby, and of the actual diversion and progressively continuing diversion as said canal proceeded towards completion, and at no time and in no form objected or protested, they are equitably estopped from now complaining. See—

2nd, Equity cases abridged, 529.

Jones vs. *The Royal Canal Co.*, 2 Malloy's Rep., 319.

Williams vs. *The Earl of Jersey*, 1 Craig & Phillips, 97.

Birmingham Canal Co. vs. *Lloyd*, 18 Vesey Jr.. 515.

Park vs. *Kilman*, 8 Cal., 77.

Pittsburg R. R. vs. *Elliot*, 10 Cushing, 191.

V.

The fifth point we make is, that since our appropriation was for irrigating purposes in a section of country where irrigation is a natural want, even under the doctrine of riparian rights (as claimed), we had the right to appropriate the amount needful for such purpose, occupying under the law the precise position as to this, of riparian owners, and that appellants can only

complain in case of actual damage growing out of excessive appropriation proportioned to the usual flow of the stream, and which excessive appropriation by us disturbs not a mere right, but some use to which appellants had previously applied the flowing water.

VI.

Before the commencement of this action the Kern Valley Water Company, with the knowledge and acquiescence of appellants, constructed a levee entirely across Buena Vista slough and swamp south of appellants' lands, and a canal in connection therewith, whereby all the water theretofore accustomed to flow either from Kern River or from the overflow of Kern and Buena Vista lakes, down to and over the lands of appellants, was diverted from its usual course and away from appellants' lands, and came into the possession of said Kern Valley Water Company.

And thereby appellants extinguished their easement as to the waters of Kern River, if any they ever had, and it is not needful that such extinguishment should be pleaded by respondents, since they do not justify under a license to themselves and because the Kern Valley Water Company alone have the right to complain of any disturbance, if such there be.

Washburne's Easements and Servitudes, 3d Ed., 26.

Veghte vs. *Rantan Water Power Co.*, 4 C. E. Green, 142–159.

Liggins vs. *Inge*, 7 Bingham, 690.

Angel on Water-courses, 391–392–393.

Civil Code of California, Sec. 811, subdiv. 1 and 3.

Statement of the Facts.

This action was brought for damages for the diversion of the water of Kern River through the Calloway Canal, and an injunction to prevent any further diversion. At the trial, the claim for damages was abandoned, and the suit is now one in equity for an injunction alone. The respondents claim the right to divert the water for irrigating public lands along the Calloway, as a prior appropriator, having made the appropriation before the plaintiffs acquired their lands. The appellants claim as riparian proprietors, by virtue of their ownership, of certain swamp and overflowed lands patented to them by the State in 1876 and later—the appropriation of the Calloway having been made in 1875. Appellants lands consist of two separate parcels lying in Buena Vista Swamp, one parcel near Tulare Lake, some fifty miles below the head of the Calloway, and the upper parcel

higher up in the swamp, about twenty miles below the head of the Calloway. Kern River rises in the Sierra Nevada Mountains from the melting of the snow, and formerly flowed down through South Fork into Kern and Buena Vista Lakes. Afterwards—about 1868—a flood changed the channels, and part of the waters of Kern River flowed into Kern and Buena Vista Lakes, through Old River, and the other part into said lakes, through New River. After the said lakes are filled, and form a large sheet of water some twenty-five miles long, the overflow sometimes goes down into Buena Vista Swamp, through Buena Vista Slough; and in times of great flood or freshet, it is contended that a part of the water of Kern River goes down into the swamp through Buena Vista Slough. Buena Vista Slough extends down into Buena Vista Swamp, a short distance from the southern extremity of the swamp, and before terminating in the swamp, cuts across one of the sections of appellants' lands at the southern extremity of appellants' upper tract or parcel. But said slough, before reaching appellants' lands, in places is very shallow, and with no defined banks, being in fact a mere depression in the swamp, and incapable of carrying more than one foot of water; and a short distance above the lands claimed by appellants, ceases to have a defined channel, but wherever the water reaches said point

above appellants' lands, it spreads out over the entire swamp, and even turns southward. Consequently, when any water does flow down into the swamp, it squanders itself through the swamp, from side to side, and therefore respondents contend that even if it could be contended that any stream or water-course exists below Buena Vista and Kern Lakes, the banks and boundaries of such stream were, and are, public lands of the United States coming up to the segregation lines of the swamp and overflowed land. The whole swamp is covered with tules, the use of which, for pasturage, constitutes the value of the swamp land.

But the appellants never made any use of this water, and have never irrigated any of their lands with it, or shown that, if irrigated, it would pay, being full of alkali. Before the Kern and Buena Vista Lakes are full, the water which appellants now claim would all flow into them, and in so doing would, ~~as the diagram shows,~~ be flowing, when there is any current, *away from*, instead of towards the lands of appellants.

There is, either no current in the Kern and Buena Vista lakes, but before they overflow, whatever current there is, is to the lakes and away from, and in an opposite direction from the lands of appellants.

The Calloway Canal (canal of respondents) was located in May, 1875, notice of location recorded, and all other requirements of law fully complied with. From its very inception, the proposed canal was a matter of puplic notoriety, and generally and frequently discussed amongst the people in the vicinity, owing as much to the magnitude of the undertaking as to the fact that its purpose was to irrigate and reclaim a vast desert waste of public lands theretofore considered worthless. J. C. Crocker (one of the appellants in this case) was a resident of Kern County, residing in the vicinity of where the canal was constructed, from the year 1868 up to the present time, and had witnessed the growth of the country, developed by the perfection of an irrigating system, diverting the waters of Kern River through numerous canals and distributing them throughout the surrounding country.

At the inception of the Calloway Canal, J. C. Crocker was cognizant of the purpose and extent of the work, and had frequently discussed it with his partners and co-appellants, Miller and Lux.

Appellants were all informed of the magnitude of the proposed canal, and knew that its construction would require an immense outlay of money, and also knew that vast sums of money were in fact being continually expended thereon during

construction, and knew that it began to divert the waters of Kern River early in 1876, and has continuously diverted them since, 1875. Notwithstanding these facts, none of plaintiffs have ever made any objection or protest to the construction of the canal or the diversion of the water thereby up to the time of the institution of this suit.

In September, 1876, the Kern Valley Water Company began the construction of its works, with the knowledge and consent of appellants and continued such construction until the completion of the dam and levee and gate at Cole's Crossing, just south of the mouth of Kern River, and a levee completely across the swamp lands and slough near the south lines of Sections 14 and 15, Township 30 S. R. 24 E. Mount Diablo base and meridian; and a short distance south of the southernmost part of plaintiffs' lands; and also a canal at that point capable of carrying, except in a great overflow, and since construction actually diverting at the will of said company, and under such license or consent, all the waters at any time reaching that point.

Said canal is about twenty-four miles in length. All this work was done with the knowledge and consent of appellants, who were stockholders in said company from its inception.

By the second levee above referred to, Buena Vista Slough was completely obstructed south of appellants' lands, thus precluding the possibility, even were said slough a part of Kern River, or itself a water-course, of any water flowing down said slough to appellants' lands, or northward of said levee, except through the Kern Valley Water Company's canal, and no water can reach appellants' lands except at the will of said company, who become the owners of such water so appropriated by them in said canal, unless in periods of great freshets when it may be possible that the levee or canal would overflow and some water thereby pass down into said swamp without the consent of said canal company. Or except, also, in case of breaking in the banks of said canal.

Argument.

All the material and controverted facts were, after hearing an unusual amount of evidence, decided by the Court below in favor of the respondents. We do not propose to review them in detail in relation to the several findings upon the facts, but shall recur only partially to the matters in evidence relating to the suggestions upon which we base the legal propositions aboverecited.

It will be observed that appellants rested their

case below exclusively upon their assumed rights as riparian owners; the claim of disturbance being urged, not of a use, but of a right, and sought to enjoin respondents upon that ground alone. The first argument we propose to present in brief, is—

That the doctrine of riparian rights as to the waters of a flowing stream, which is claimed and asserted by appellants, was unknown to the common law, and had its origin solely in motives of public policy in England and in the Eastern States of the Union, especially to encourage milling and manufacturing interests, in modern times and within the present century; that, at common law, running water was "*publici juris*," and the right to it could only be acquired by appropriation and was lost by abandonment of the use.

In the twenty-fifth year of the reign of Charles II., the first reference in English authorities to the right of flowing water occurs. It will be found in the opinion of Lord Hale in *Cox* vs. *Mathews*, 1st Ventris Rep., 237. Lord Hale says:

"If a man hath a water course running through "his ground and erects a mill upon it, he may "bring his action for diverting the stream, and "not say '*antiquum molendinum;*' and upon evi- "dence it will appear whether the defendant hath "ground through which the stream runs before

"plaintiff's, *and that he used to turn the stream* as he "saw cause, for otherwise he cannot justify it, "though the mill be newly erected."

In other words, if a party upon the stream erects a mill, even though it be a new one, and has *thereby* appropriated water, he can bring his action for disturbance of his use, but the answer would be that the defendant had already previously appropriated the water; the substance being, that if a party who erects a mill, even though it be not an old mill, but a new one, and has appropriated the water, he can bring his action, and the answer to the action is, as stated by Blackstone, that the party above him has already appropriated it. And this is precisely the view Blackstone takes of Lord Hale's idea, as stated in his second volume, page 403. Not the construction, however, placed upon the language of Lord Hale by Chief Justice Denman in *Mason* vs. *Hill*, wherein he, seeking to establish the doctrine, as now claimed, of riparian rights, says that Lord Hale meant by saying, "That he was used to use the water above," practically meant that he had used it over twenty years, which was the period of prescription, when there is no such thing in the case. And it never was so understood by Blackstone, nor by anybody else who has ever read it.

Blackstone, in his Commentaries, Book 2, page 14, says:

"But, after all, there are some few things, not-
"withstanding the general introduction and con-
"tinuance of property, must unavoidably remain
"in common, being such wherein nothing but a
"usufructuary property is capable of being had,
"and therefore they still belong to the first occu-
"pant, during the time he holds possession of
"them, and no longer. Such are the elements of
"light, air and water. * * * All these things,
"so long as they remain in possession, every man
"has a right to enjoy without disturbance; but,
"if once they escape from his custody, or he vol-
"untarily abandons the use of them, they return
"to the common stock, and any man has a right
"to seize and enjoy them afterwards."

And in Book 2, page 403, Mr. Blackstone says:

"If a stream be unoccupied, I may erect a mill
"thereon and detain the water, yet not so as to
"injure my neighbor's *prior* mill or his meadow,
"for he, by his first occupancy, acquired a prop-
"erty in the current."

Mr. Chitty, in his notes to the above, same page, says: "Running water is originally *publici juris*,
"and an individual can only acquire a right to it
"by applying so much of it as he requires for a

"beneficial use, leaving the rest to others, who, if "they acquire a right to it by subsequent appro- "priation, cannot lawfully be disturbed in the en- "joyment of it." The notes of Mr. Chitty are full and refer to a number of authorities, all illustrating the common law doctrine to have been as we claim.

And Christian in his note says: "Any one may "build a mill and detain or divert the water to "supply it, provided he leaves sufficient for all the "*previous purposes to which it had been applied below*, "and provided he does not throw it back upon "any other ground, or upon a *previous* mill above, "so as to lessen its fall upon its wheels, and "thereby diminish the effect of his neighbor's "machinery."

This principle has been adopted in New York. I refer counsel to 10th Johnson, 241, and 3d Johnson's Chancery, 287. Now, such is the doctrine of these great masters of the common law, Hale and Blackstone. In 6th East's Reports, which is the first case decided upon that question, we find that the same declaration of principle is made—page 370, the opinion of Le Blanc, Justice. The facts of this case were these: The defendant had for a long time used a large portion of the water of this stream, had diverted it, and was using it in his manufacturing operations. The

plaintiff below him, the infra proprietor, appropriated the balance that he (the supra proprietor) did not use; and in 1791 the defendant took the balance of the stream from the plaintiff *after* his appropriation of the overplus. These were the facts of the case. Lord Ellenborough in this case speaks, as your Honor will observe, and as will probably be referred to by counsel, of rights acquired by prescription. The prescriptive right having been acquired. But the proposition embraced in the opinion, as delivered by Le Blanc, Justice, states the common law doctrine as I have suggested it to the Court, as follows: "As to "whether particular facts proved in a cause should "or should not be pointedly left to the consider- "ation of the jury, much must depend upon the "manner in which the case is stated to the Judge "and the jury at the time. Now, here the point in- "sisted upon by the defendants at the trial was, "that as prior to the year 1787, those who occupied "the defendants' premises were the only persons "who had works on this stream, and had taken, "from time to time, as much water as they pleased, "leaving the rest to flow in the natural channel. "The plaintiff, who came, in 1787, to an estate "lower down the river, had only a right to take "so much as the defendants did not choose to "take at any *future* time." (He was the grantee of the previous riparian owner, because the land

on all the streams had been owned for centuries before.) "This position it was which my brother "Graham denied to be law, and I think he prop- "erly denied it. For the true rule is"—(here he undertakes to state rule)—"For the true rule is, "that after the erection of works, and the appro- "priation by the owner of the land of a certain "quantity of the water flowing over it, if a proprie- "tor of other land afterwards takes what remains of "the water before unappropriated, the first-men- "tioned owner, however he might *before such sec- "ond appropriation* have taken to himself so much "more, cannot do so afterwards." Showing that it was absolutely the doctrine of prior appropria- tion, and nothing else (that was recognized) at common law.

In the case of *Saunders* against *Newman*, in 1st Barnwell and Alderson's Reports, page 261, Bailey, Justice, says: "I do not see how the "alteration of the wheel can make any difference "in this case; at least so far as to withdraw it "from the consideration of the jury. It seems "to me that all the allegations in the declaration "were proved. The plaintiff proved that he was "possessed of a mill and that the water had "flowed from time immemorial in a particular "channel, and that the defendant had obstructed "it. The objection, therefore, if any, must be

" upon the record. If a person stop the current " of a stream which has immemorially flowed in " a given direction, and *thereby prejudices another*, " he subjects himself to an action."

Now we will see what is meant by the phrase, " And *thereby prejudices another*."

Abbott, Justice—" When a mill has been erect- " ed upon a stream for a long period of time, it " gives to the owner a right that the water shall " continue to flow to and from the mill, in the " manner in which it has been accustomed to flow " during all that time. The owner is not bound " to use the water in the same precise manner, or " to apply it to the same mill. If he were, that " would stop all improvements in machinery. If, " indeed, the alterations made from time to time " prejudice the right *of the lower mill,* the case " would be different; but here the alteration is by " no means injurious, for the old wheel drew " more water than the new one. I therefore " think that in this case the non-suit should be " set aside, respecting only the right growing out " of prior appropriation."

Holroyd, Justice—" The rule laid down in " *Bealy* vs. *Shaw* by Mr. J. Le Blanc is this: " That *after* the erection of works, and the appro- " priation by the owner of the land of a certain

" quantity of the water flowing over it, if a pro-
" prietor of other land afterwards take what re-
" mains of the water before unappropriated, the
" first-mentioned owner, *however he might before*
" *such second appropriation have taken to himself so*
" *much more*, cannot do so afterwards. The de-
" fendant, therefore, had no right to use the water
" in this case after the erection of plaintiff's mill,
" in a different manner than it had been accus-
" tomed to be used before, for at all events by
" that act the plaintiff appropriated to himself the
" water flowing in that particular way."

In *Liggins* vs. *Inge*, in 7th Bingham's Reports, page 692, Tindall, Chief Justice (whose name is eminent as a Common Law lawyer), says: " Water
" flowing in a stream, it is well settled by the law
" of England, is *publici juris*. By the Roman law,
" running water, light and air, were considered as
" some of those things which had the name of *res*
" *communes*, and which were defined 'things, the
" 'property of which belong to no person, but the
" 'use to all,' and, by the law of England, the per-
" son who first appropriates any part of the water
" flowing through his land to his own use, has a
" right to the use of so much as he thus appro-
" priates, against any other" (*Bealy* vs. *Shaw*, and others); " and it seems consistent with the same
" principle that the water, after it has been made

"so subservient to private uses by appropriation,
"should again become *publici juris* by the mere act
"of relinquishment. There is nothing unreason-
"able in holding that a right which is gained by
"occupancy should be lost by abandonment.
"Suppose a person, who had formerly a mill upon
"a stream, should pull it down and remove the
"works, with the intention never to return, could
"could it be held that the owner of other land
"adjoining the stream, might not erect a mill and
"employ the water so relinquished, or that he
"could be compelled to pull down his mill, if the
"former mill-owner should afterwards change his
"determination and wish to rebuild his own?"

Now that was the doctrine of the English Courts. That was the declared doctrine of the ablest commentators upon the common law. But that I am not mistaken in this, that it is no new idea, that it is something familiar to the professional mind, accepted as a historical fact in reference to the common law, I refer to "Goddard's Law of Easements," an English work, and a very able and celebrated work upon that subject. He says, pages 251 and 252: "That all
"riparian owners on natural streams have a ripar-
"ian right to use the water as it flows past their
"land so long as they do not interfere with the
"natural rights of other riparian owners, and to

"sue for disturbances, is now an established doc-
"trine of law; *but this doctrine was not established*
"*until comparatively modern times; and in the earlier*
"*decisions of the Courts a theory of a very different*
"*kind was advanced by which rights were supposed to*
"*be acquired by the appropriation of water similar to*
"*those which have since been held to apply to all ri-*
"*parian proprietors of streams*, ex jure naturæ. *The*
"*earliest doctrine on this subject appears to have been*
"*that flowing water was the property of no one, and*
"*that nobody had any particular right to use it until*
"*somebody actually took possession and applied it to a*
"*purpose of utility; that by so doing he acquired a right*
"*to continue the use of it against all the world, and*
"*this right continued until he chose to abandon the use*
"*of it.* This theory of title by appropriation was
"much modified by various decisions as the nature
"of riparian rights was brought more nearly un-
"der consideration, and ultimately it was deter-
"mined that these riparian rights to the use and
"uninterrupted flow of streams were not acquired
"by appropriation at all, but that they existed
"and belonged to every riparian owner of land
"*ex jure naturæ*, whether he chose to make use of
"them or not."

He refers after that to the leading case of Mason against Hill, which, as I have stated to the Court, did not turn upon any such proposition, but was

upon the question of prior appropriation, itself, the leading case, and the dicta of that case, announced for the purpose of promoting the purposes of public policy in England at that time, have been followed by the more modern Courts in England and in the Eastern States where manufacturing interests are fostered. For the purpose of carrying out and establishing this idea, Goddard says: "When, however, this change of opin-"ion first arose, it was also so held that the effect "of an appropriation was to give the riparian "owner a right to sue for disturbance; for it was "said that he could not sustain any damage by "the loss of water, until he had applied it to a "purpose of utility, and that purpose was dis-"turbed, for actual damage was always considered "essential to support an action on the case." That was the common law, too, in announcing this new doctrine—this modern doctrine of riparian rights, the Courts did not at first pretend to go to the extent of authorizing any action to be brought by a riparian proprietor until he himself had first appropriated the water by virtue of his riparian ownership, and he could bring no action for disturbance except the disturbance was a disturbance of his prior appropriation. Goddard continues:

"In process of time, however, this theory was

"also abandoned; and it now appears to be con-
"sidered that an action will lie for every disturb-
"ance of riparian rights, without evidence of ap-
"propriation of the water for any purpose at all,
"and without even proof of any special damage,
"but simply on the ground that the legal right is
"injured, which is sufficient damage to support an
"action. *Appropriation of the water of flowing*
"*streams for purposes of utility has thus gradually*
"*fallen from being considered the means of acquiring*
"*important water rights to being deemed of no import-*
"*ance whatever, whether as a mode of gaining a right*
"*or acquiring a right to sue for disturbance.*"

Now is that correct? Is that a correct statement of the law? Does it follow the line of authority? Was it the common law that the riparian owner could insist that a stream should flow forever, unaltered in quality and unchanged in quantity by his bank.

If it was not, then it is not the law of California, if we are to believe the Legislature of the State. If the common law is the rule of decisions, then no such right is known to the laws of this State.

Now it is perfectly patent, if the Court please, that this new doctrine asserted by the plaintiffs in the case, was not in the common law of England,

and it was not so understood in the earlier cases in America. I refer, among other cases, to the case of Perkins against Dow, 1st Root's Reports, page 537. After reciting the case (as was the custom in the reports, it seems, at that time, the case was decided in 1793): "The question was "whether the defendant had the right to diminish "the quantity of water by spreading it upon his "land to manure and enrich it and make profit. "The Court determined that he had, provided he "did it prudently, and did not deprive the plain- "tiff of the surplus; and judgment was entered "accordingly."

Your Honor will find, upon the examination of the facts in that case, that the uses to which he applied it were, irrigation. That he diverted the larger portion of the water of the stream for that purpose, he being the *supra* proprietor, and that when he had used such portion as he had diverted for the purpose of irrigation, as was needful for that purpose, the waste water from it mainly went down into a swamp, and did not return to the channel. Yet the Court held that there was no proper cause of action. In Western against Alden, 8th Mass., 136, a strong and clear case declares and adopts the same principle.

I am aware that since the decision of *Mason* vs. *Hill*, in 3d Barnwell and Adolphus, frequently re-

ferred to as a leading case on the subject of riparian rights, the American decision following that, and the decision of Judge Story in *Taylor* vs. *Wilkinson*, in 4th Mason, have held, in the main, that he who owns a part of a bank of a stream has a right to its flow, unaltered and undiminished, by his bank, as a part of his riparian rights. Not that this embraces all that riparian rights mean; but in reference to the usages and claims as to a flowing stream, this is the expression; but it will be found upon the examination of the case of *Mason* vs. *Hill*, regarded as a leading case, that that case itself turned upon no such proposition.

Even the declarations of that case, the assumed leading case on that subject, are mere dicta, because that is always dicta when pronounced by a Court, which is not needful to the decision of the case.

In that case the question of prior appropriation, and prior appropriation alone, was ample and sufficient to have disposed of the whole case as it was finally disposed of. And the same remark is strictly applicable to the decision in *Zimler* vs. *St. Louis Water Co.*, 57 Cal., 221. But Lord Denman, in giving his opinion in that case, said that it was important to have the question settled. I do not propose to use his language; I state the substance: "In a country," says he, "where the

"integrity of a flowing stream must be preserved "in the interest of the manufacturers, the large "development of manufacturing interests forces us to this idea of public policy, to wit, the keep- "ing of water within the natural current, and "only permitting it to be diverted to be turned "back again as soon as the power is used, and to "be used again by others as it flows." This was but repeating the doctrine of the Vice Chancellor in *Lewis* vs. *Howell*, and upon which alone that dicta was based, showing that the change in the current of the judicial mind of England of that day, 1833, was controlled and directed by the idea, that the manufacturing interests of the country required development; and that it was public policy to keep the water within the actual channel, for use, as it might be needed, from its source to its mouth.

This, the same idea, was indicated by Judge Story in *Tyler* vs. *Wilkinson*, and the leading American cases that followed it. In the East, where the wants of irrigation are unknown, where the rain-falls are frequent, where the whole country sprouts with springs all over it, and where great public and private interests are involved in mills and manufactories—it cannot be complained that the courts sought, and successfully sought, to change the rule of the common law, because

those who judicially control countries, as is frequently stated in the law books, must consider, in their decisions upon points of this character, the social, geographical and climatic conditions of the countries which they judicially rule.

Upon the second point we say: In the early settlement of this State, before there was any statute law, when the excitement in reference to the discovery of gold and the reports of the salubrity of the climate and all those inducements calculated to incite emigration first had their effect in the East, and upon the whole world, immense numbers flocked to this coast. They came here, finding after they arrived, no fixed and settled municipal law in reference to the labor which they came to perform, the enterprises which they undertook to carry out, the relations which they should occupy with those indulging in similar enterprises and having similar purposes. There was no fixed and understood principles of law; consequently those coming from law-abiding communities, understanding even without that, that it was necessary that there should be some system which should govern and regulate their rights of property—what we call custom (which is the origin of all law, in fact, whatever theories we may indulge about it)—grew up among the people of California, the miners and ditch owners of the country,

whose interests embraced mainly the material interests of the State, or of the territory at that time. They had to adopt it unincumbered by any notions of judicial precedent of any sort—uninformed, it may be, of what might or might not be the law in other localities relating to rights of property. They sought to adopt, as between themselves, that idea of right and duty which naturally suggests itself to men in such relations.

Mines were being discovered, opened and developed all over the country. They could not be worked without the use of water, which they had to carry, at times, to great distances, and the law began to be, and was,—it became to be the settled law—that whoever was first in time was first in right. They seemed unwittingly to have adopted the old maxim of the common law, "*Qui prior in tempore potior est in jure.*"

The people of California assembled in their Legislature on the 13th of April, 1850, cognizant of what was then by custom the law of this State, mindful of the great interests they were there to conserve and promote, and conscious of what the common law was and had always been, passed this Act of April 13th, 1850: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State

" of California, shall be the rule of decision in all " the courts of this State."

Now, if the common law had been, that the proprietor upon the bank of a flowing stream had the right to insist that it should forever flow unaltered in quality, and not sensibly diminished in quantity, by his bank, as a riparian proprietor, then this declaration of law by the Legislature of California, on the 13th day of April, 1850, would have been a practical repeal of all then known law and custom in this State. I take it that this proposition will not be denied. It will not be asserted that instead of adapting the legislation of the State at that early stage to the wants of the people, and conforming to what was the common law of the people at that time (for the people always make the law), they would have denounced every idea that was prevailing at that day in reference to the rights to water, or to the use of water; and would have said that notwithstanding, all through the Sierras and their slopes, energy and enterprise had developed and were developing mines which were enriching the State and astounding the world, depending for their present utility and future development upon the use of water brought at great distances, in places over indifferent localities, through the mountains; this shall not be regarded, if, perchance, some man at the

mouth of any one of the great streams of the State should get his 40-acre tract, and assert what is called riparian rights, the intent of this declaration of the common law being the rule of decision in this State, being, that he shall rest there and levy tribute upon the energy and enterprise of the State forever.

But the Legislature of the State of California knew what they were doing; they knew what the common law of England was—the common law, as it was understood and interpreted by the English courts—in so far as adapted to the colonies, up to the 4th day of July, 1776, and not the common law as now administered under the English statutes or its applicability to the different phases of public policy in England, as understood and developed since that time; but (as stated by the Court in its presumptions in Abbott's Practice Reports, volume 3, in the case of *Throop* against *Hatch*, page 25): "The common law, as under-"stood and interpreted at the time of the sever-"ance of the colonies from the mother country." Certain it is that, that was adopted as the rule of decisions in this State—the common law, as administered on July 4th, 1776.

The custom of California adopted by miners and ditch owners in early years, from their own sense of natural right, was but an adoption of the

common law. It was known of course publicly to the whole people of the State, and was especially known and understood by the Legislature who represented them, when assembled in 1850; and it is impossible to believe that in making the common law a rule of decision the intention of that Legislature was that all the then known laws of the State, in relation to all the then recognized property, or most of it, in the State, should be abrogated, and the whole industrial system of the State destroyed at a single blow. That such was not the purpose was understood by the Courts. In the case of *Irwin* against *Phillips*, 5th Cal, page 140, the Court took occasion to say, referring to rights acquired by custom: "So fully recognized "have become those rights, that without any spe- "cial legislation conferring or confirming them, "they are alluded to and spoken of in various "acts of the Legislature in the same manner as if "they were rights which had been vested by the "most distinct expression of the will of the law "makers."

The reference being to that custom of miners and ditch owners which had been adopted and had become, if we may call it so, the common law of California, which was then but a repetition of the common law of England. And the Court, in 27th of Cal., page 482, in the case of Hill against Smith, Judge Sanderson delivering the opinion, says:

"The reasons which constituted the ground work of the common law upon this subject remain undisturbed." It will be observed in examining this case, if your Honors please, that Judge Sanderson felt that he must recognize the common custom of the State of California, the custom that had always been recognized as the law of this State. He felt a difficulty in making it comport with what had been his preconceived ideas of the common law as to riparian rights. But your Honors will observe that he gives precedence to the custom in delivering the opinion of the Court, and recognizes it in such form as makes it absolutely destructive to the whole theory of what is now claimed to have been the common law doctrine of riparian rights. "The reasons which constituted "the ground work of the common law upon this "subject remain undisturbed. The conditions to "which we are called upon to apply them are "changed, not the rules themselves." (Precisely the same language in substance as that of the Supreme Court of the United States, in Atchison against Peterson, in 20th Wallace.) "The maxim, "*sic utere tuo ut alienam non laedas*, has lost none "of its governing force; on the contrary, it re-"mains now, and in the mining regions of this "State, as operative a test of the lawful use of "water as at any time in the past or in any other "country. When the law declares that a riparian

" proprietor is entitled to have the water of a stream " flow in its natural channel *ut currere solebat*, with- " out diminution or alteration, it does so because " its flow imparts fertility to his land, and because " water in its pure state isindispensable for do- " mestic uses." (Assuming that to have been the common law which was not the common law.) " But this rule is inapplicable to miners and ditch " owners, simply because the facts upon which it " is founded did not exist in their case. They " seek the water for a particular purpose which is " not only compatible with its diversion from " its natural channel, but more frequently neces- "sitates such diversion, and moreover does not re- " quire the water in a pure state in order to insure " its reasonable and beneficial use." And upon that rule of law the case of Hill against Smith went off, that among ditch owners and miners, in California, it was not only useful, but necessary, to divert the stream from its natural course in order to utilize it for any beneficial purpose at all; and that it did not destroy its use by corrupting, or muddying, or changing its quality, for the purposes to which it was sought to adapt it. Now, if the common law doctrine be such as is claimed by the plaintiffs in this case, and if that be the law of this State, then it is denounced absolutely and unqualifiedly in the opinion in Hill against Smith.

But the Supreme Court of the United States, in the case of Atchison against Peterson, in 20th of Wallace, took occasion to recognize this same doctrine. The lands, mainly, were owned by the United States Government. If anybody's interests had been interfered with, it was hers; she was the riparian proprietor, and in disposing of the lands to other parties, she proposes to pass—that is, she sought to pass—whatever rights she held in reference to them; and the government of the United States, through its Supreme Court, adjudicating upon the rights of parties growing out of their relations to the public lands, admitted that there was no such thing, practically, as this riparian right recognized on this coast; that it has been utterly destroyed and abrogated by the customs of California, which had been recognized and approved by the Act of 1866, which they say was not merely an Act for the preservation of those rights, but a declaration of the will of the government in reference to the mode of acquiring rights—in substance, a recognition of the custom of California upon the subject.

A RULE OF PROPERTY.

Now the Supreme Court say, in *Atchinson* against *Peterson*, 20th of Wallace, 511: "As re-
"spects the use of water for mining purposes, the
"doctrines of the common law declaratory of the

"rights of riparian owners were at an early day "—after the discovery of gold—found to be in- "applicable, or applicable only in a very limited "extent to the necessities of miners, and inade- "quate to their protection." This was the view of the Court upon that branch of it. "This "equality of right among all the proprietors on "the same stream would have been incompatible "with any extended diversion of the water by one "proprietor, and its conveyance for mining pur- "poses to points from which it could not be re- "stored to the stream; but the Government, being "the sole proprietor of all the public lands, "whether bordering on streams or otherwise, "there was no occasion for the application of the "common law doctrine of riparian proprietor- "ship with respect to the waters of those streams. "The Government, by its silent acquiescence, as- "sented to the general occupation of the lands "for mining, and to encourage their free and un- "limited use for that purpose, reserved such lands "as were mineral from sale and the acquisition of "title by settlement. *And he who first connects his "own labor with property thus situated and open to "general exploration does, in natural justice, acquire a "better right to its use and enjoyment than others who "have not given such labor.*" Meaning thereby in terms to recognize that custom that had grown up among the people and had been recognized in the

Act of 1866, and referred to as the custom of California, endorsed by her legislation and administered by her courts.

Being the owner of the whole estate, the dominant and the servient tenements the United States Government declares, through her highest judicial tribunal, referring to the Act of 1866, and giving their construction of it, that that Act declares a rule of property, not in reference merely to vested rights which had already accrued, but a rule of property in reference to all the lands held by the Government. Having a right from her position to impose any condition she chose upon parting with the public property, or any terms upon the public property before parting with it, she declares that this is *a rule of property* in this State. That is the sense of the opinion. All these opinions upon the subject—*Broder* against the *Natoma Water Co.*, *Dennison* against *Kirk*—all of them go upon the idea that this Act of 1866 by the Congress of the United States, not merely relates to rights which have become vested, but that it amounts to a declaration of a rule of property that is recognized by the Supreme Court of the United States, and must be recognized by this Court, to-wit: That whoever hereafter takes any of the public domain of the United States, takes it with a knowledge

of the fact that the Congress of the United States and the Supreme Court of the United States so construing the purpose of Congress, have declared that there is no such thing applicable or intended for the State of California as this doctrine of riparian rights insisted upon by the plaintiffs; but whoever, by appropriation, first acquires the right to the use of the water of a flowing stream shall be entitled to so use it as long as he does use it, the right escaping as he permits the water to escape from him. Now it seems to me that we cannot make any other legitimate construction of the views of the Supreme Court except that. They did not pretend to relate to past transactions; they did not pretend to confine themselves to rights which had accrued up to the Act of 1866, but they seek to establish a rule of property in reference to it, going back, without so saying, to that custom, to the common law itself, to the customs of California which were but the common law, in so far as the legal relations of property to the individual were concerned, and to the laws of the State as declared on the 13th of April, 1850.

Shall we seek to adapt the disposition of questions of this sort in this State to the decision of *Mason* against *Hill*, and of *Taylor* against *Wilkinson*, following the theory of the leading case as stated

by Lord Denman and illustrated by him, the reasons for it being that the manufacturing interests of the country demanded it? Shall the courts of California, right in the teeth of the statute of the State, in the teeth of the custom of the country, seek to conform against the State law and against public policy, rules and decisions in reference to great water interests of this State, to those of localities wherein different ideas of public policy naturally and necessarily prevail?

The language of Judge Bronson in 20 Wendell, afterwards quoted with approval by this Court, is worthy of consideration. The case was one growing up, I believe, in reference to whether the Genesee River was a navigable stream, and the English law was—there was no question about that—the English common law was, that tide water was the test of a stream being a navigable stream. He said, very properly, that it was nonsense to say that such was the law of this country; it could have no application, with our immense fresh water rivers intersecting the country, all over it, and a great many of them navigable almost to their source. And yet, so fond were the courts of America of that idea of following in a straight line what they deemed to be the English decisions at that time upon that subject—I believe it was late in this century; I do not re-

member the year—when the Supreme Court of the United States finally decided that that doctrine did not apply to streams in America, Judge Bronson says that it is the duty of the Court to look to the geographical and climatic conditions of the country, and that a doctrine that might be very applicable in England—a small island with a very few navigable streams and all of them tide water streams, easy of explanation and application there—would be found utterly inapplicable here. Now that was upon a proposition where there was no question about what the common law was.

But the proposition of the appellants here is that it is the duty of this Court to denounce the common law by its judicial action, and answer their prayer for an injunction by stopping the diversion of the waters of Kern River, as they say, above where they own lands upon the banks; because it is the public policy of England and of the Eastern States, as recognized by the courts since 1833, that large manufacturing interests demand it. Not because it is the common law, but because large manufacturing interests demand that the waters shall be kept in the stream to be utilized by one manufactory or mill and turned into the stream to be utilized by another down to its mouth, and that in order to conform to this line of precedent, in the very teeth of the public

policy of the State, in a country where the sleeping fertility of our arid plains but waits the application of enlightened industry to develop them into gardens, depending upon the free use of water which is made impracticable under the theory presented by the plaintiffs, it shall be the duty of this Court, from its love of a precedent based upon a different theory of public policy, not only to go in the teeth of the statute of 1850 and to denounce the common law as adopted in 1850, to denounce the customs of California as understood and recognized in the legislation, among the people and in the courts, as accepted and recognized by the Government of the United States, but to so apply that doctrine to thousands of blooming gardens rescued from the desert by enlightened industry, that they shall be relegated to their former sterile condition in order to sustain our respect to a precedent that was itself a violation of the common law and that will be an absolute violation of the true rule of the public policy of this State.

It does seem to me, if the Court please, that the very basis of plaintiff's claim—and it is a most important question, a most interesting question—that a flowing stream shall continue to flow unaltered in quality and not sensibly diminished in quantity by the bank of the proprietor, is clearly

a doctrine unknown to the common law—a doctrine admitted to be inapplicable to the condition of things in California, and a doctrine which our Supreme Court has not in a single instance recognized, the point never having heretofore been distinctly made and argued to this Court.

I am perfectly aware, if the Court please, that recently, in the case of *Zimler* against *San Luis Water Co.*, it might, without deliberate consideration and thorough examination of the principles involved in that case, appear that the Court intended to recognize, to a degree, the doctrine of riparian rights as asserted by the plaintiffs in this case, but the decision of the Court in that case was absolutely right, upon the theory of the common law, as accepted and adopted by the Act of 1850, and as herein contended, no man can question who will read the decision. Now, the doctrine of the common law was first, that running water was *publici juris*—that whoever appropriated it had a right to it as long as his appropriation continued; secondly, that he could sue for a disturbance of his right, but he could not sue until he had acquired the right by appropriation, and that there could be no disturbance except a disturbance of the use of the water which he had previously appropriated.

As to the case of *Zimler* vs. *San Luis Water Co.*,

57 Cal., 221, the only part of that decision that has any reference to the subject, (there are other parts of the case that turn on the questions of license and grants, and things of that sort,) The Court says: "It appears by the record that the "plaintiff was the owner of a tract of land which "required irrigation, and that some of the waters "of the above named creek, which flowed through "the premises, were used for that purpose by the "plaintiff. In April, 1877—less than two months "before the commencement of this action—the "defendant diverted the waters of said creek from "said premises and deprived the plaintiff of the "water which she *had been using, and which was "necessary for the irrigation of said land.*" She was a riparian owner. It is true, she had not adopted the forms of appropriation prescribed, perhaps, in the Code; it was not necessary, because they recognized her right as a riparian owner in the Code itself, to appropriate, without reference to form. She had appropriated. The suit was for a disturbance of her use of the water which she had been using, and the Court say: That being the case, it does not matter under what form this appropriation was made. It is of no consequence whether there was any notice on record or whether it was industriously followed up in the form prescribed within sixty days after the record notice. All those matters have no concern with

it at all. She was a riparian owner, and being that, she had appropriated; she had appropriated before the defendant, and the defendant comes in here and disturbs the use, and had no right to do it. This was the common law. There is not a better statement of the common law in any book than in the language of the Court in *Zimler* vs. *San Luis Water Co.*: "As a riparian owner the plaintiff is entitled to the relief prayed and granted, "unless the defendant had acquired a paramount "right to all the waters of said creek." And the only mode in which he could have acquired a paramount right would have been by a license, which would have extinguished the easement of the plaintiff, or by a grant, or by limitation, or by prior appropriation. There is not the slightest intimation in that opinion, but that if the defendants had actually appropriated that water, and used it, before any appropriation by the plaintiffs, whether they were riparian owners or not (such an appropriation would not have been good). I expect to show to the Court before I get through, from the Code and from the authorities, that it makes no difference upon this subject. If the defendant had actually appropriated and used the water first, then the converse of these propositions would have been true. In the first place, the plaintiff would have had no right of action, because the defendant had made a prior appro-

priation; and in the next place, she could not have come into Court, because she had had nothing to disturb—that had been disturbed—since as at common law it was the disturbance of the use, and that alone, which gave a right of action.

But it is said it is useless to think of this; does not the statute talk about riparian owners? Does not the Code, Sec. 1422, at the close of the chapter on the subject of appropriation say, that "the rights of riparian owners shall not be affected hereby?" Well, what rights of riparian owners shall not be affected hereby? Does it say, we give any rights to riparian owners? Does it say, we repeal the Act of 1850? Does it say, we are going to start out upon a new venture and inaugurate a new system of jurisprudence upon the water question? Does it say that we have never known any such thing in the history of California legislation or jurisprudence, or custom heretofore, as that which is claimed by the plaintiffs in this action as being the rights of a riparian owner, but that now, suddenly and without notice, we intend to declare that the common law is no longer the the law of this State; that the customs of the country shall no longer be observed, and for fear that we will so astound the public of the country with the announcement, we stick it in as a proviso, and are careful in the language, and we sim-

ply say that "the rights of riparian owners shall not be affected hereby?"

Well, if they have any rights, I suppose they are not affected *hereby.* The fact is they could not be affected *hereby;* nobody's rights can be affected by a statute. We cannot take a man's property from him; we cannot take away his right if he is a riparian owner, to appropriate the water that passes by him. It is the common law right; it is *jure naturæ;* it is recognized by the customs of the earlier people; by the whole system of jurisprudence of the State; nobody wants to do that. Say the Legislature, we recognize the fact that all over the State this idea of appropriation had been the leading policy; that there has no other thing been known in California—not an instance known in the whole of the legislation and jurisprudence of the State, of a water right except by appropriation. A great deal of irrigation is talked about—mines are being developed, ditches are being constructed. The system is unsettled, and we will regulate it. People who do not own the banks of a stream we can control, because we can provide the mode of their appropriation. We can tell them to post their notices, and we can require them to have them placed upon record; we can say you must follow up your notice with a certain amount of work within a certain time;

you must go on to completion; you can only use it for certain useful purposes. We can control them and we have a right to direct them in what they shall do in reference to water. We know they have the right to appropriate; we are conferring no new right upon anybody; it has always been the law in this country that they had the right; we do not propose to confer a right or take it from them. But we propose to regulate it in such form as that the world may know when the purpose of appropriation is indulged when the fact of appropriation follows the purpose, and to confer the power to procure by condemnation of a right of way, but we do not pretend to interfere with the common law. The Legislature of California has said, it shall be the rule of decision of this State, and that by the common law the riparian proprietor, or whoever chose, could appropriate water, but the riparian owner's right is one that we cannot interfere with. We cannot disturb the right which he has—the water comes to him; he owns to the center thread of the stream. he owns to the heavens and to the center of the earth under and within his lines. He has a right to divert it for any useful purpose, he cannot do it in mere playfulness or malice, or make it an active agent of trespass, but for any useful purpose he has a right to do it in such mode, at such times and upon such notice, or without any no-

tice, as he chooses, and it is not any of our business, and we cannot say anything to him upon this subject. We cannot disturb that right; but he must appropriate it; we do not say he ever gets the title to flowing water without appropriation. We do not say that; we do not say that he has got it without appropriation; the fact is he has not. He is not using it; he is not utilizing it; he may have a right to appropriate it, but he must utilize it before anybody else does who interferes with him, or he cannot complain of that disturbance. We do not propose to affect his rights as they are at common law, but we propose to give him no new rights. We do not propose to gather up those fragments of the common law and of public policy, which are the results of a disregard and breaking up of the whole system of the common law, to be found from *Mason* vs. *Hill*, scattered all through the books, and frame it into a system, and say we confer this power as a donation by the State—there is no such purpose in the Act. But we say to you, if you are a riparian owner, that we do not propose to control and direct your action in regard to your appropriation. We do not pretend to tell you that you shall not appropriate, because that is interfering with your rights, and we do not propose to destroy the whole system of water uses in this State, either. We do not propose to tell you because

you own ten acres at the mouth of the San Joaquin or the Sacramento river, that you can sit there, and at your will levy tribute upon every man up to its source, or to the source of any branch of it. We do not propose that you shall occupy any such relation to the public as that you can control the development of the State in all its breadth, from her arid plains to her mountains, by announcing such a doctrine as that.

Suppose that the position of the plaintiffs is right about this; that this exception in the proviso to the law upon the subject of appropriation means, as they claim, your Honors will see in a moment that not only can no water be appropriated upon any stream in this State as against any riparian proprietor below, but it can not be appropriated as against any riparian proprietor above, in such form, but that the risk is so great that no man will venture the peril.

What are the rights of a riparian proprietor (as claimed)? That as against everybody except a riparian proprietor his rights are absolute. That is the doctrine. Then, if he goes upon Kern River about its source, above where it debouches into the plains from the mountains, and buys him a little tract of land, he can rest in quiet until every ditch owner in the whole country below

him has constructed canals, built works, and utilized them for four years, eleven months and twenty-nine days; then he constructs a ditch that turns off the whole water of Kern River from everybody below him, and no one dare open his mouth, because is not he a riparian proprietor? *Nor can any appropriation affect his rights?* Is anything that he does to be affected by any one? Can his rights, say appellants, be affected? Does not the Code, Sec. 1422, protect them and say they shall not be affected by any appropriation? Can not he wait and rest near the head where this stream comes out of the mountains until he sees everybody below him, not riparian owners, who want to utilize it for useful and industrial purposes apply it, and wait until nearly the five years' use has expired and then dig his own canal and turn off the whole stream, and no man can say a word. Is there any such a doctrine as that to be indulged? But it is not only that. If the construction of the plaintiffs is correct upon this statute, then the riparian proprietor himself cannot appropriate it. He cannot do it under the law as they understand it, and why? Because under their notion of riparian rights a riparian proprietor himself cannot divert the stream; he cannot alter its quality and he cannot diminish its quantity sensibly—that is the doctrine, as against an infra riparian owner.

Then the purpose of the Legislature, according to the plaintiffs, was not only to destroy the right to appropriate, of everybody, not riparian owners, who had therefore been appropriating, *but in the very act of regulating appropriation to destroy the right of the riparian proprietor as well as everybody else to appropriate, under any circumstances.* There is no other legitimate construction. Indulge it, construe the Code as claimed by the plaintiffs, adapt the principle to cases that may suggest themselves to the judicial mind, and carry it out to the legitimate result of effective reasoning—it is certain that the conclusion must be, that if the legislature meant in saying that the rights of no riparian owner shall be affected hereby—that such rights as are claimed by the plaintiffs shall last forever in this State, notwithstanding the appropriation by the riparian owner or by any other person, riparian owner or not, above or below him—then this section of the Code is absolutely a denunciation and repeal of the whole system of appropriation—renders futile any purpose to appropriate water, or makes the risk so great that no man would dare venture it, and practically destroys the whole system in the State, repeals her laws and inaugurates a system at war with everything that has been understood to be in favor of her interest by our legislation and by our courts.

There is an Act of the Legislature to which I desire to refer in this same connection, an Act of 1876, relating to the counties of Tulare, Fresno and Kern. This is an Act concerning water ditches and water privileges for irrigating, mining and manufacturing purposes in the counties of Fresno, Tulare and Kern, approved March 29th, 1876. Sec. 4 of that Act provides:

"Any person or persons desiring to construct a "ditch, to appropriate water for irrigation, manu- "facturing or mining purposes, shall file a petition "with said Commissioners stating in that the "stream, from which they intended to take the "water, the point where the proposed ditch will "commence, its general course, and the proposed "size thereof; whereupon the said Commissioners "may grant the right to construct said ditch, and "to use water sufficient to fill the same for the "uses and purposes set forth in said petition."

Now, there is nothing in this Act making any exception about riparian ownership. And it is said in Sec. 11, that all Acts and parts of Acts, so far as they conflict with the provisions of this Act in the counties herein named, are hereby repealed. All Acts and parts of Acts, in so far as they conflict with these provisions—the Act itself being a legislative declaration. If we should look to that for construction, it is plain that they

never dreamed that this exceptional proviso on the subject of appropriation of water was meant to re-inaugurate the doctrine of riparian rights, as declared in the case of *Mason* vs. *Hill*. But they provide for the appropriation of water from the streams in these counties—provide for it by appriation alone, without reference to the ownership of the soil.

It must be remembered, too, that under our Code it does not require any ownership of the soil to have a water right. It is expressly provided, Sec. 802 having declared that a water right was an easement. They say "the following land "burdens or servitudes upon lands may be granted "and held though not attached to land." Among them is the right of taking water, wood, minerals and other things. Now it had been a notion among the recent English and American decisions, that a water-right was an easement growing out of the ownership of the dominant tenement—an interest in the servitude which was imposed by law, from the relations of the parties to the stream, upon the servient tenement. Now the statute of California says that it need not be attached to land. If that means anything, it means that it requires no ownership of land; it means that the grant of the right to take the water is good absolutely as against the State if she owns the lands,

would be good by relation to the previous decisions as against the Government—would be presumed to be good as against any private individual who might own them and who himself was not complaining, because the right to the water need not depend upon any ownership in land in this State. It does not relate to the interest which the dominant tenement holds in a servient tenement, requires no interest in a dominant estate or in any estate in the lands. And this is destructive of the doctrine of riparian rights as claimed, since the easement does not and need not depend on ownership of the bank. The right of way for the ditch may be used after condemnation, without reference to ownership of the realty.

The fact is, the idea of a code means a mere formulating of what is already the law. We all know that the doctrine of appropriation as to flowing water had always been the law of this State. It was an effort of the Legislature to provide a mode of doing it, so as to give proper notice to everybody who might desire to object, that now was the time and the opportunity to make their objection, before rights should grow up, before the work was actually done, before large sums of money were expended and great ventures had been undertaken in inaugurating and completing the work. Appropriators were re-

quired to post notices, to place their notices upon record, to post them at the point of diversion upon the stream, to tell the world: "Here is what we propose to do; if there is any objection to it, now is the time to make it before any equity shall grow up." That was the idea of the legislature. Not to confer any new rights, but to provide a mode in which the existing right should be exercised; so that when it says in the last clause , this shall not affect the right—it can only relate to that which was the policy of the law, and which was embraced within the law, and which is identified in all its provisions, to-wit: That they, as riparian owners, having the right at common law to appropriate without reference to form—having the right to divert the water wherever their banks reached it on a flowing stream for useful and beneficial purposes upon their own premises, provided it had not been previously appropriated; having the right to do that—they say: "these people owning a part of the bank at common law, have always had the right to divert the water as they chose, and at common law nobody else could divert it or take it, because it was *publici juris*, and whoever seized it owned it, and they, owners of that bank, could always divert without trespass. We do not propose to interfere with this right of theirs. We only propose to regulate those who

are not intererested in the border of the stream." So that if there be anybody in interest or otherwise to object—if any trespass upon the realty, or by the diversion has been or is about to be committed, or any controversity about right of way—the time for their objection shall be fixed when the notice shall have been posted and recorded, and they illustrate that in the subsequent Act of 1876.

It seems that in some of the counties of this State, or from three of the counties of this State, the representatives in the Legislature had an idea that a conflict of interest might grow up in the appropriation of water, it being a natural want in that part of the country—in the counties of Tulare, Fresno and Kern. They provided for Water Commissioners, making a mode of appropriation since 1876, in that section of the State, or sought to do it, different from the mode which had been provided for the whole State by the Act of 1872; and they say in the fourth section of that Act: Any person or persons desiring to construct a ditch and appropriate water for irrigating, manufacturing, or mining purposes, shall file a petition with said Commissioners, setting forth the stream from which they intend to divert the water, the point where the proposed ditch will commence, its general course, and the proposed

size thereof, and where taken; said Commissioners may grant the right to construct said ditch, and to use the water sufficient to fill the same for the uses and purposes set forth in said petition; provided, that nothing herein contained shall be so construed as to effect the rights and privileges of those who, *by prior appropriation* (not by virtue of any modern idea of riparian rights), but by appropriation, and by actual use have secured the right to the use of the water from the several rivers and streams of Fresno, Tulare and Kern Counties. And in the 11th section they say: "All Acts and parts "of Acts, so far as they conflict with the provis- "ions of this Act, in the counties herein named, "are hereby repealed."

It shows what the Legislature thought of this provision, Sec. 1422 of the Civil Code. It could not have been their policy to establish a rule of property rights in one part of the State different from another. They had a right to permit a plan of appropriation, by preference, in certain counties different from any other; but it was not the purpose to say: In these three counties we recognize no such doctrine as that the owner of a part of a bank of a stream shall have it flow to him forever, unaltered and unchanged, but in the balance of the State we do.

Now, if the Court please, we come to the consideration of the Third Point:—

If the plaintiff is a riparian owner, and if it be true that the doctrine of riparian rights, as contended for by the plaintiffs, is the law of this State, then it is incumbent upon them to show that they are riparian owners. They have the laboring oar in this business. They must first show their title to the land. They must then show that the land borders upon a water course. They must show that what they claim as a water course consists of a channel with banks and bed, in which the water usually flows. That it is in fact and in law a water course. That is one proposition that we make. The next is (and embraced in the general point) that they must show that this water course, if they can succeed in proving to the Court by the testimony that they are upon a water course—that the water course whose banks they own is the water course which we have diverted. They must show the continuity of the stream from the point of diversion to their banks.

The doctrine is settled in the text books, drawing their inspiration from all the decisions on this subject. (See Angell on Water Courses, Washburn on Easements, Goddard's Easements and Servitudes.) All of these say that a water

course means a channel with banks, bed, and water; that the water *may not always, but must usually, flow.* The language of the Supreme Court of Maine states the doctrine with great accuracy:

"A natural water course consists of bed, banks, "and water, yet the water need not flow continu- "ously, and there are many water courses that are "sometimes dry; there is, however, a distinction "to be taken in law, between a regular flowing "stream of water which at certain seasons is dried "up, and those occasional bursts of water which, "in times of freshets, or melting of ice and snow, "descend from the hills and inundate the country."

It is the case of the *City of Bangor* against *Lansil*, 51 Maine, page 595. The case of *Ashley* vs. *Walcott et al.*, 11th Cushing, page 195, the Court say:

"It is manifest that the main issues between "the parties on these pleadings was upon the "question of the existence of a brook or stream "of water. It is averred by the plaintiff and de- "nied by the defendants, and constituted the gist "of the case, without proof of which the plaintiff "could not maintain his action. It was not "enough, therefore, for the plaintiff to prove, in the "support of his declaration, a mere right of sur- "face draining from his land on, through, and over

"that of the defendants, in the spring and autumn,
"and at other times when the water was high,
"*without proof of a stream or brook within the chan-*
"*nel of which the waters regularly run.* He had
"averred no such right, and if he proved it, it
"was an entire variance between his allegation
"and proof, and established a case different from
"that set out by him in his declaration, and one
"which the defendants were not bound to meet.
"Nor is such a variance by any means immaterial.
"*A mere right of drainage over the general surface of*
"*land is very different from the right to the flow of a*
"*stream or brook across the premises of another.*"
(This explains *Connor* vs. *Ogburn*, 46 Cal., 347, drawing the distinction very clearly between the right to the flow of a stream, and an easement for escape of water.) "There is a
"broad distinction between a regular flowing
"stream and occasional and temporary out-
"bursts of water, which *in times of freshets fill*
"*up low and marshy places, and run over and inun-*
"*date adjoining lands.* To maintain the right to a
"water course or brook, it must be made to ap-
"pear that the water *usually flows in a certain direc-*
"*tion, and by a regular channel, with banks or sides.*
"It need not be shown to flow continually; it
"may be dry at times, *but it must have a well de-*
"*fined and substantial existence.*"

Now, I take it, that is a very clear statement of the law. The same idea is expressed in *Rawstrom* vs. *Taylor*, in 11 Exch., 367. This is the case to which I especially ask the attention of the Court. It is absolutely and unqualifiedly in point upon all the testimony in reference to this case. It is practically a diagram of Buena Vista Slough and its surroundings, within the swamp land district, not as to lines and figures, but as to substance; and I respectfully ask the Court to read and examine this case, in reference to the diagramatic plan presented in the opinion.

The case of *Swett* vs. *Cutts*, 50 New Hampshire Rep., page 445, is a very strong case in point.

In *Curtis* vs. *Ayroult*, 47 New York, page 77, the Court say: "We have examined with care "the testimony in this case, particularly those "portions of it to which we are pointed by the "brief of the appellant, and which he claims show "the existence in former days of a natural stream. "We are of the opinion that the jury would not "have been warranted in finding that there was "ever a natural stream running from the mouth "of Indian Creek, or from the marsh, into the "cove. There are some expressions which might "indicate this, if they were detached from the "mass of the testimony and considered alone.

" But the strong force and preponderance of it all " is, that *only in times of high water*, did the " waters from the marsh flow over the banks of " the river or of the cove, *and not then in a regular* " *and defined channel.* When the flood had no more " subsided than as to leave a depth of three or four " feet *in places on the marsh*, there was no over- " flow, and witnesses for the plaintiff say in ex- " plicit terms, that before the ditch was dug there " was no regular channel for the flow of the water " into the cove. The waters which stood upon " the marsh or were held in partial suspense in " the earth, *were in legal effect surface waters.*"

It will be found beyond all controversy, I think—that is, all reasonable controversy—that the doctrine of riparian rights, as claimed by appellants, and as based upon the leading case of *Mason* against *Hill*, in England, and *Taylor* against *Wilkinson*, in the United States, and the cases that from motives of public policy or local considera tions in reference to manufacturing or milling interests have followed that line of cases, contrary to the doctrine of the common law, it will be found, that they all go upon the theory that the riparian owner is the owner of the bank of a flowing stream where the water usually flows. It must be a bank; with reference to ripa it means a bank. It must be something defined, tangible, provable.

Now, what are the facts of this case? If the appellant is a riparian owner, and seeks to recover upon that ground alone, as he has told the Court, it is necessary in law that he should be the owner of a bank of a flowing stream, with a defined channel, banks, and bed, wherein the water usually flows. It is necessary, in pleading, that he should allege this; and it is necessary, on trial, that he should prove it. It is not difficult of proof; if it exists, itself is a physical fact. It is as easy to establish as that a bridge spans a stream. It is not a thing about which reasonable beings, familiar with the locality, can have any difference of opinion. If it be that after examining a doubt remained as to its existence, that doubt is a certainty that it does not exist. It is not one of those things that can remain doubtful. If a definite channel be there, then a definite channel can be shown to be there beyond all question. It must be something that can carry the water—something that does carry it.

There is one peculiarity about this case to which I invite the attention of the Court: There is no witness who testified to ever having seen this stream flowing *within its banks*. Not one. No one has ever pretended such a thing. They have talked about the geography of the country, they have talked about depressions, they have

talked about overflows, and they have talked about long lagoons and ponds and gouges and partial channels, but no man yet, not even appellants' witness, Dover, who, for eleven years, had lived right there and witnessed every rise and fall and had for miles along the stream hunted and herded his hogs—a sort of swamp angel himself—ever saw it running in its channel throughout that swamp land district or throughout any definite length of that swamp land district; but it must do it—the channel must be capable of carrying some water to be a channel. The best test whether that be a channel or not is, whether there be such a depression. They talked about depressions, if not channels—illy defined channels. Let it be as illy defined as you please, let it be that unobserved depression, which it takes scientific skill to discover by the actual adaptation of the instruments provided for that purpose to develop it, or whatever the nature of the depression be, it must be something in which the water will and does flow before it will spread over the entire tract of country.

Now, what is the testimony upon this subject? I shall not delay the Court by reference except to one or two of the main points of the testimony, and that, the testimony of the appellants themselves. The Court below found that there was

no water course in Buena Vista swamp. One of the plaintiffs, Mr. Crocker, greatly familiar with that whole country, constantly in the line of his business, within the swamp and about it, knowing as much as anybody about it, says—the question was asked him by counsel for appellant: "When a moderate head of water is running in "there, it would be confined to the banks, when you speak of well defined banks?" (This is interrogatory.) "How would it spread over where "the banks were not so well defined." Your Honor will remember that Mr. Crocker had spoken of defined and undefined banks. The question put by Mr. Houghton was: "How "would it spread over where the banks are not "so well defined?" J. C. Crocker answered: "It varies considerably, the country does there; "in some places it would spread a quarter to a "half a mile. In other places it would spread "very little, if any; it would leave the tule lands "out of water in many places; *in many places it "would flow back southward instead of in its usual course.*

See Transcript vol. 2, page 127.

The witness, Dover, for appellants, testified vol. 2, page 317 of manuscript:

"The swamp will overflow its banks before fill-"ing or connecting in the channel." This is the

appellants' testimony. Is it to be believed? I do not pretend to say but what they said there was a channel, but they explained the channel to the Court, and the explanation utterly does away with the whole testimony upon the subject, because it shows that whether you call it a channel, or a depression, or what not, there is nothing there that can save that district from overflow from any head of water that is turned into it.

Now they call that a channel. They say it is not very well defined in some places, but they say there is a channel. Well, if there is a channel there from the headquarters levee, Wible's Camp, that channel will carry water down to Sec. 24; it is capable of carrying some body of water down there. But there are two people, two witnesses who have testified upon this subject, one of them peculiarly informed about it, because he is the only one whose residence and observation justifies the Court in placing confidence in his statements and his deductions from the facts that surround them, which are in evidence. It is Mr. Souther. Mr. Souther says: (abbreviated—Transcript, Vol. 3, pages 168, 169, 170, 171 and 172.)

"In 1878 I undertook farming in parts of Sec-
"tion 2 and 11, southwest quarter of 2, and ran
"through 33 and 34, and put in some corn and
"pumpkins on 32 and 34. My camp was on the

" south end of what is called Central Cut on the " map. The design of the cut was to carry the " water across the field into the slough. There " was a break; there was no slough to amount to " anything. I designed running this water to my " field, which I did. I made a roadway, and on " either side of that roadway had a canal to con- " duct the water down through those lands. The " water could not run through the slough at that " place; it spread all over the country at the up- " per point of Central Cut." There was no particular channel, it spread all over the country before it got to Bonestell's.

Now the upper point of Central Cut is just below Norton's on Sec. 10, which some other witnesses corroborate in their statements. He says it would not connect in the channel; therefore there was no channel, or it would connect. "When " the water gets there, it spreads to the south, " overflows to the south at that point," instead of going on its course northward to Tulare Lake. When it strikes this point of the channel, of this defined water course, it spreads out; it would not go on but turns backward in its course to the south. " When I left, the water was overflowing " my crops. It seemed at that time to be coming " from the east."

The witness, McMurdo, vol: 4, pages 266–269, folio 1068, says in substance:

" It continues to run in a very crooked course, " and has deep holes in it there with defined " banks until it reaches section 15, township 30, " range 24 (until it very nearly reaches the plain- " tiff's lands, in other words). At that point " there are some ponds on the outside channel when " there is any water in the slough—any amount " of water; it gets into those ponds there and in " between—that is, between the channel and be- " tween the levee of the canal—the bank of the " canal at that point."

Now, if the Court please, it will be seen that the testimony as to this south end of the swamp land district, is as conclusive as to the want of the presence of any definite water course in the shape of there being any channel capable of carrying the water as is the testimony with reference to any other part of the pretended channel in the swamp land district, and these are matters entirely capable of absolute proof—physical facts, plainly discernible, about which reasonable people can't have any question. Reasonable men may have controversies as to what they imagine to be there, or may imagine not to be there, but if there be a well defined channel—a thing capable of carrying water—then it is one of those

things as plainly provable, as I said before, as that a bridge spans a stream. There can be no sort of question about it.

But, again, if plaintiffs seek to maintain their rights as riparian owners upon Buena Vista Slough in the swamp district, they must not merely show that the slough has a defined channel with banks and bed, but that water *usually* flows in it, or did usually so flow before disturbance. That is an element as to which there can be no sort of controversy. The water must usually flow. Now, if the Court please, what is the testimony as to the usual flow of water in Buena Vista Slough in the swamp district? There is no doubt but that at times that whole swamp land district has been covered with water. There were two notable occasions. One, the great rise of 1861-2, and the other in the freshet of 1867-8.

But the plaintiffs are called upon to show, not that there was a freshet in 1861-2, which overflowed that swamp land district, and in 1867-8 another, but that the water usually flows there, or did. And their witnesses alone tell us enough for the Court to form its impressions upon the subject, and, of course, to sustain the finding of this Court below. They don't ask any witness, how long in a given year did the water flow there? No witness is asked that question. They don't

ask any witness how many years consecutively did you see the water flow there? They ask no witness if he saw the water flowing a half a year or a quarter of a year, or a week or a month. There is no such testimony, as I remember. But they introduced witnesses who said that they had seen the water overspread that district in the times of freshet, and that they thought that there was a perceptible current; some perhaps threw tule in and saw a current, and they did show that there was a fall in the country from the end of the swamp land district at the south to its end on the north. Now, what is the testimony given to the Court by the mouths of their own witnesses as to the continuous flow of water? Let us see what it is. We have seen what they have not shown.

F. A. Tracy, a witness for appellants, testified in vol. 2, pp. 248 and 249, transcript, folio 991.

Question—"Has there been at all times a con-
"tinuous current of water through Buena Vista
"Slough from the Tracy Crossing" (which is south of appellants' lands,) "to Tulare Lake?" (north of appellants' lands).

Answer—"In 1863–1864, and 1871 and 1877,
"I think those are the years it has been compar-
"atively dry."

Vol. 2, folio 991. Ques.—"What portion of "the year 1863 was it that condition?"

Ans.—"It was quite late in the fall of the year "that I was there, and then I found the water "standing in holes * * it remained in that condi- "tion until towards the spring of 1864."

Vol. 2, folios 992–3. Ques.—(Referring to the year 1864.) "What time did it fall into holes?"

Ans.—"'Pretty early in the season.' 'Quite "'early.' * * * 'Along about July it got "'down; at any rate by the last of July it was in "'holes;' it remained in that condition until 1865, "'I think. It was late in 1865, * * * but "'there was water there; a great while in 1865."

Vol. 2, folio 996, page 250, trans., vol. 2, Mr. Tracy continues, * * * "In 1871 it really "dried up, and was in holes towards the latter "part of summer."

Vol. 2, folio 998 * * * "It was drier in "1876. It went into holes, I think, and pretty "early in the season, I think, of that year—per- "haps in July, and may be in June."

Vol 2, folio 999 * * * "It went into "holes in 1877, pretty early in the season. If it "was that year I pumped, it was in November I "stopped pumping."

Folio 1,000 * * * "In 1878 it was better. "We had no pumping to do in 1878."

Vol. 2, folio 1,002. "The last time I was "down there, the water was running under the "bridge," (Cole's Bridge), "and northward. I "think that was in 1879." (He had previously stated that at that time the lakes were full.)

Vol. 2, folio 1,003. Ques.—"Now, you have "been down there, and familiar with it ever since "1863, isn't it a fact that there has been, taking "one year after another, a matter of uncertainty, "whether there would be any water running down "there the greater portion of the year?"

Ans.—"It has been a matter of uncertainty. "There are certain years it did not run. The "facts are just as I have related them, as near as "I can remember." * * * "I have seen it a "number of years not so high" (in the river) "as "it is now; the majority of the seasons I have "been here, I think it is higher now than the av- "erage."

Mr. C. W. Clarke, of Sacramento, witness for appellants, speaking as to the year 1865, and of May or June of that year, says: vol. 2, page 287, folio 1147. Ques.—"What was the condition of "the water in the slough at that time?"

Ans.—"Perfectly dry."

Vol. 2, folio 1148, page 288. The witness Clarke, continuing, says: "I was down there again "in the fall of 1865. It was then dry." * * * "I suppose I was there thirty days."

F. W. Barnes, witness for appellant, testified, vol. 2 of Transcript, page 340, folio 1359 * * * "In the summer of 1867" (referring to Buena Vista Slough) "that country was all dry * * * "The whole slough was dry from Webber's place "across. Mr. Crocker had a number of wells "there to pump water for cattle."

F. M. Epperly, appellants' witness, testifies, vol. 2, page 572, folio 2285, after having testified ~~that~~ the land in the swamp from early in 1871 to 1876, says—

Ques.—"You think it was in holes from the "latter part of August, 1871, until about Decem- "ber, 1872?"

Ans.—"No, sir; it dried up entirely, finally; "it quit running then in August."

Ques.—"In the winter of 1871?"

Ans.—"Yes, sir."

Ques.—"And remained that way until the wa- "ter came down about December, 1872?"

Ans.—"Yes, sir."

Mr. Crocker, one of appellants, was asked, vol. 2, Transcript, pages 141 and 142, folios 563 and 564—

Ques.—" Now, I ask you what portion of that " swamp land has been dry the entire year through " since 1873–74?"

Ans.—" Well, there has been quite a propor- " tion of it * * * Sometimes it has been all dry."

Appellants, then, not only have failed to show that, for a single mile, it continuously flowed, but there is testimony to show that for nearly every year it was in holes, and dry throughout the time, or most of it; that it did, in high rises, run down into the swamp land district and spread out and fill portions of this pretended channel, and overflow wherever it touched the swamp, every year—or almost every year—is perhaps the truth. But that it went through the district—I don't suppose that happened since 1867 or '68—and such going down there and spreading out as occurs from these annual freshets, which is a mere partial watering of these swamp land districts, in itself, is not such a flow of water as that it can be set up here, and successfully maintained, that these appellants own land upon a water-course, upon a flowing stream, brook, river or rivulet, through which the water usually flows. Therefore, we say, if the Court please, that there is not a particle of evidence that the appellants are riparian owners, admitting all that they may claim by virtue of riparian ownership, if they were such owners. That on the con-

trary, the testimony is most conclusively the other way. I have not recurred to the large mass of evidence on this subject. It has been entirely unnecessary to do so. It is material and pertinent to the issues all through, and the Court below has passed upon it in its findings upon the facts. But the large mass of it was to the effect that there was no such thing as a continuous channel or flow. That was a matter of observation and opinion, not only by the ordinary visitors who went there with a view of seeing if there was, but by those who were scientifically informed about those places, and who, perhaps, were by the nature of their professional employment peculiarly adapted to the investigation of questions of this sort; all that is in the statement of facts.

How do they get their water when it comes? What is the testimony on this subject?

The water reaching appellants' land at any time, is conditional and dependent upon the amount of water discharged naturally into Kern and Buena Vista lakes. The evidence shows that the water of Kern River, half of it at least, goes down Old River into Kern and Buena Vista lakes, and that the water of New River, as far as anybody has been acquainted with it, had gone, previous to the construction of the levee at Code's

Bridge, down in Buena Vista and Kern lakes until they had received a sufficient quantity of water, from this source and otherwise, to overflow. That is the testimony of Souther, of Oder, of Wilkinson, of Dixon, of McLane, that all the water—all this river—previous to that time, so flowed, and the only conflict that can be suggested about this is, that at times of great freshets and in actual overflows of the usual channels of the river, covering the whole country, there was what is called the north or middle branch. that might have carried some of the water of the river at such times down into the swamp land district. This, however, was of very rare occurrence, never happening in ordinary high water.

While this case was in progress in the Court below, the testimony showed—the photographs illustrated—that Kern River was booming, was in fine condition, was a beautiful and magnificent stream, and that there was not a drop of water in either the middle or the north branch, and the water then in Kern River was (according to the witness, F. A. Tracy, as above shown), above the average in volume for all the years he had known it. Not during the whole progress of this trial, did either of those pretended branches have any water, showing that it requires a very great overflow, even now, with all the artificial construc-

tions there to turn the water, for any part of it to be turned down into the swamp land district, and then only when the whole country and the lakes are overflowed. The object of the construction of the dam at Cole's was to prevent the natural flow of Kern River into Buena Vista Lake. The testimony shows the nature of that construction and its effect, but that is an artificial work. Appellants cannot claim the water turned by that, or by the effect of that remotely, in any form, as a natural stream, because it is an artificial water-course, and can only be claimed after five years of actual use without interruption, thus becoming by prescription in law, a natural stream; and it is not pretended that respondents constructed Cole's levee, or had anything to do with it.

Now, what is the testimony upon that subject? It is that naturally, Buena Vista and Kern lakes are the points of discharge for the waters of Kern River. The mouths of Kern River are in those lakes, and the water that reaches naturally the swamp land district, or that did naturally reach it, is—and has always been—from the overflow of the lakes. Warring continually with a rapid evaporation—which was shown to the Court—with all the uses to which it had been applied by others, through the numerous canals above the mouths, with the vast amount of seepage which

is incident to the nature of the sandy country over which it flows and where it is discharged; all tending to prove that any water reaching appellants' lands, was always a remote and conditional fact. Instead of their lands being upon the continuous stream which we have diverted, they are below the mouth of Kern River; they receive water whenever it is received from the surplusage of water in Kern and Buena Vista lakes, which are filled not alone by Kern River, but by the drainage of an immense water-shed from the south and west, one-half as much as the entire water-shed of Kern River itself, as testified to by witnesses.

IV.

Upon the fourth point we say that early in May, 1875, before the plaintiffs had any title to this land, as they say under oath in their complaint, and while—as they say under oath—the title vested in the State of California, the defendant (Canal Company) posted its notice of the intended construction of the Calloway Canal, and followed it up with energy and industry continuously to the completion of the work to its present stage.

There is no conflict in the testimony on that subject; there is no point made but what the appropriation was pursuant to law, and it was legi-

timately and properly done. We gave the appellants constructive notice of what our purpose was—we complied with the law; we understood the law to mean that if anybody was going to object to this thing, that we should put it on record and post it at the point of diversion, giving every one an opportunity to make objection before expending our hard-earned money in developing a work in the interest of ourselves and the country. We gave appellants the opportunity of making objection at that time, by constructive notice; but we were not satisfied with that, we informed the appellants personally—we gave them actual notice; that is what Mr. Crocker tells us. Mr. Crocker says—he is one of the appellants—vol. 2, pages 166–167, Transcript:

I heard people say that Calloway had commenced a canal there, but I never talked to him about it.

Q. Did you make any objection to his taking the water from the river ?"

A. "I don't know that I ever had anything to "say about it, one way or the other. I didn't "know of his building the canal of my own knowl-"edge. I merely knew Calloway as I met him on "the street. I think I spoke to Miller and Lux "about it three or four years ago. I don't know if "it was when I first heard it talked of. I spoke

" to them of the fact that a canal *was being started*
" there. I knew by hearsay where the canal was.
" I presume I heard of the dimensions. I presume
" I told Miller and Lux of its dimensions or of
" their talking of it—a large canal. I presume it
" was the general talk. I knew some canals re-
" corded notices, and I looked over the books of
" recorded notices here some eight or ten years
" ago."

The above is the substance of Crocker's evidence on the subject. The construction, even the commencement of it, was necessarily a well-known public fact.

Now, of course, there is no question of the fact but that these appellants had both actual and constructive notice of the proposed building of the Calloway Canal (and the diversion of the water thereby). We say, that under those circumstances, it was plaintiffs' duty, if they felt that any right which they had, or supposed they had, was being disturbed, to give us notice of it, and to make their protest—to make their objection in some form. We say the true and equitable rule has always been that, if they thought we were going to damage them, they should have procured an injuction, or, at any rate, their objection should have been notified to us. They had no right to stand by and see us expend our money and our

energy and our labor upon this work, and wait until nearly the period of prescription (by assimilating that to the Statute of Limitations), near the expiration of five years before they said anything on the subject. And they have, after waiting all that time, and being damaged none in all that time, come here and ask the relief of this Court.

A party who stands by and witnesses the construction of great works to divert the water by a supra proprietor, or by one appropriating under the statute above him, and who permits it to go on to completion, is estopped in equity, outside of the mere proposition that a Court of Equity will not hear him, because that is an independent proposition and does not depend upon any showing that the defense may make. This latter proposition is that a Court of Equity will not and should not hear a man complain who has for years suffered what he calls a nuisance to be perpetrated, who tells the Court that during those years the nuisance has not damaged him, that its diversion and use resulting in the nuisance has been at great cost and expense to the defendant, and that he has not opened his mouth. I say that the rule is that this Court will refer him to a court of law to settle his rights, if any he has.

The law is that a man who does this, who per-

mits an easement which is held by the dominant estate that he owns to be diverted or enjoyed in an unlawful way, or an improper way, at great expense and says nothing, that if he has not spoken when he should speak, he shall not do it when he will; and this was the early doctrine of equity recognized and practiced in the chancery courts. The first case to which we refer is in 2d Equity Cases, abridged, page 522, and the line adopted has been followed consistently since: "A diverted a water course which put B to great expense in laying of sewers, etc., and the diversion being a nuisance to B, he brought his action at law for damages, but an injunction was decreed upon a bill exhibited for that purpose, it being proved that B did see the work when it was carrying on and connived at it without showing his disagreement, but rather the contrary."

Now, here in the case referred to, the watercourse is diverted—diverted at great cost and expense—in the presence of the infra proprietor, and with his knowledge. He says nothing until the expense has been undertaken and incurred, and the work completed. He then brings his action at law. He does not go primarily to the Court of Equity and ask an injunction, but he brings his action at law; and so little right did he have to do it, under the circmstances, that the

Court of Equity held that he was estopped in equity—that there was an estoppel *in pais* in equity by virtue of his silence in the midst of the surrounding facts, and the injunction issued staying his proceedings at law. Now, the doctrine of that case, according to my information, has never been attempted to be questioned. The same theory, the same law, the same doctrine, is announced in the case of *Jones* against the *Royal Canal Co.*, in the year 1808, reported in the second volume of Molloy's Reports. Lord Manners, being the Chancellor, says, page 319:

"To have a work erected at great expense, "whether private or public, removed by this Court "as a nuisance, the person complaining should "have given notice not to proceed, otherwise the "Court will leave the plaintiff to the law."

The doctrine of that case was approved in the case of *Williams* against the *Earl of Jersey*, Craig & Phillips' Reports, first, page 97. The Court says:

"In the case of *Jones* vs. *The Royal Canal Co.*, "Lord Manners went to this extent: He held "that it was the duty of a party, seeing a nuisance "in progress, to give notice to the party erecting "the nuisance, of his intention to object."

Now, it may be claimed by counsel, that he had

not the right; though I believe he had, if there was a threatened disturbance of his right, to call upon this Court, before any diversion of the water (as is illustrated in the case of 2d Johnson, to which counsel referred), to stop it But that is not necessary; he should have protested; he should have given notice. We should have heard some note of warning from those people, who have not been damaged in these five years of use, that before or at the end of that period they were going to come into this Court and ask the exercise of its equitable powers to protect them against something that has not hurt them. The Court continue. referring to Lord Manners' opinion:

"He held that it was the duty of a party, seeing "a nuisance in progress, to give notice to the "party erecting the nuisance of his intention to "object. There is a very short note of the de- "cision; but assuming the note accurately to state "what Lord Manners said, it shows a case in which "a party would be precluded, by an omission to "give notice, from asserting an equity. Certainly "it is a different question whether such an omis- "sion would give the adverse party an equity to "prevent the party, concealing his right or ap- "parently acquiescing in the nuisance, from as- "serting his title at law to compensation for the "nuisance when affected." (There is no such

pretense here.) "But there are two cases in which "that has been done; I mean the case of the "water-course, and that of *Short* against *Taylor*, "both reported in Second Equity Cases Abridged, "522. Referring now to *Short* against *Taylor*, "which is said to have been decided in Lord "Sumner's time, a brief note of which only is in "Equity Cases Abridged (and which does not re- "fer to the report in which it is contained), where "injunctions were granted to stay actions for "nuisance, because the plaintiff at law had en- "couraged them"—encouraged them by silence—by their tacit assent. "I think it is impossible, "after those two cases, to say that a party may "not so encourage that which he afterwards com- "plains of as a nuisance, as not only to preclude "him from complaining of it in this Court, but to "give the adverse party a right to the interposi- "tion of this Court in the event of his complain- "ing of the nuisance at law."

So that not only, as suggested to the Court under the facts of this case, are they precluded from any hearing, favorably, in a Court of Equity, but if they had undertaken to proceed at law it would be the duty of this Court, recognizing the equitable rules upon this subject, to interpose and stop them, because they were in the perpetration of a great wrong. They were trying to destroy large

and expensive works that had been erected under their eyes and with their assent; waiting until such works had been put to practical use, before they come in to levy tribute, as the price of continued silence.

In the case of the *Birmingham Canal Company* against *Lloyd*, in 18th Vessey, Jr., page 515, the Court say:

"Assuming for the present purpose this piece "of water, called Broad Water, to be a reservoir "within this Act of Parliament, the plaintiffs "must establish their right to damages at law be- "fore I ought to grant this injunction." That is Lord Chancellor Eldon, than whom no man who has ever lived since chancery courts were known, is higher authority. "Assuming, for the present "purpose, this piece of water called Broad Water, "to be a reservoir within this Act of Parliament, "the plaintiffs must establish their right to dam- "ages at law before I ought to grant this injunc- "tion. I proceed here upon the circumstances "of delay. The defendants having in pursuance "of their promise to give six months' notice of "beginning to work their mines, give notice in "April, 1810, expressly mentioning their purpose "to open the slough, the company having given "a counter notice that they would in that case "seek damages at law, and having a right to apply

" promptly to this Court to prevent the act, in-
" stead of taking that course, permit the defend-
" ant *to expend two thousand pounds* in proceeding
" towards getting coal, by erecting fire engines,
" etc., and when they are about to get the coal
" the plaintiffs come for an injunction. *They*
" *ought to have commenced their opposition when they*
" *could have done so with justice.*"

That is the whole proposition of this whole case before a Court of Equity. They should have been heard when they could have been heard in behalf of justice. Lord Eldon continues:

" And, though this is not the case before Lord
" Hardwicke of stopping a colliery actually work-
" ing, yet the act of stopping or draining a col-
" liery about to be wrought may possibly, with
" reference to rival ownerships, be the means of
" making it absolutely unproductive twelve
" months hence, when it is to be wrought, in-
" stead of at the present time. I have seen the
" injunction granted in Lord Byron's case by Lord
" Thurlow, who, though the plaintiff applied im-
" mediately, put him to go forth to trial. These
" plaintiffs, therefore, not having applied until
" nearly two years after the notice was received,
" must take their *chance at law;* and this Court
" ought not to interfere by granting an injunc-
" tion."

The same doctrine has been practically recognized in *Parke* vs. *Kilham* in 8th California. In the report of the facts of that case we find this: "On the trial defendant's counsel asked the Court "to instruct the jury, that if those from and to "whom plaintiffs claimed had the prior right to "the waters in the middle fork of Jackson creek, "and they stood by and saw those from whom "the defendant derived his title to the ditch and "the right to the waters in said creek, appropri- "ate the waters of the creek at a great expend- "iture of money and labor, under the mistaken "idea that the defendant's vendors were obtain- "ing the first appropriation, and did not inform "them of the mistake, that they, the plaintiff's "vendors, and the plaintiffs who claim under "them, are estopped from setting up their prior "right at this time." This instruction the Court refused to give, and the defendant excepted. And the Supreme Court, in their opinion, say: "The instruction offered by the defendant we now think was substantially correct and should have been given." Recognizing precisely the doctrine as illustrated in all the older cases, and that cannot be denied upon any respectable authority, where the facts exist for its application.

Do the facts exist in this case? Here, by the testimony of one of the appellants, we learn that at

the very inception of this idea, when this canal was first spoken of, it seems, he heard of it. He knew not only of the fact of its proposed projection and construction, but of its dimensions. He was not content with that. He had discussions with his partners—the co-plaintiffs—upon the subject, years ago, he tells us, at the commencement of the work. It is a matter necessarily within that sort of inevitable knowledge that comes to the Court from all the facts and circumstances in this case, that appellants must have known all about the proposed construction and the actual construction of our canal—it is a matter of public notoriety. It was a great work undertaken in a sparse community. It was proposed to awaken into fruitfulness the sleeping fertility of a desert. It proposed to take a large amount of water from Kern river. It proposed to make vegetation grow where none had ever grown before. No such work had been heard of, or known in that section of the country, at least up to that time. It was a matter about which everybody was informed, and about which peculiarly and especially the appellants in this action were informed, according to the statement of Mr. Crocker himself. Still they said nothing. They made no protest. They gave no notice of protest at the threatened disturbance of any right they had. On the contrary, as the testimony

shows, they were anxious to get rid of the immense quantity of water that at long intervals, sometimes, rushed down upon them, always overflowing the entire swamp, and knowing no channel. On the contrary, the uses to which their land was appropriated, was benefited by our acts. That is the testimony. The only use to which it ever has been appropriated was benefited, and will continue to be benefited, by our diversion of the water. Appellants had gone there to take possession of a swamp land district, and the idea upon the mind of everybody was that it was to be reclaimed, because their title, equitable only, it was supposed, might depend upon the fact of reclamation. The government did not want it. Nobody wanted it as it stood. But the theory of the law in making the grant was that by the application of industry and money to it, it might be put in some sort of shape that would be useful to mankind.

They take it and they say, "We want it as it is. We want it to graze our cattle on forever, upon the tules." The testimony shows that the tule growth was better for cattle all the time during a dry year than if the water was upon it. And that caused the appellants to tell the Court after weeks of effort to prove damage, "We confess that we were not hurt—we have not been

hurt—we knew we were not going to be hurt—we didn't open our mouths, because we did not apprehend danger. We understood the equities of this transaction; we know, as men of common s nse, as the Court knows, as a Court of Equity always knows, that when a man sees money going to be expended, and large works undertaken which may interfere with the rights of others, some notice of opposition to the work should be given. We knew that. This is natural law. But we expected it to help us. It has helped us. We come to this Court and tell the Court, not that it has helped us, except by our evidence; but we declare that it has not hurt us, through the mouths of our counsel, in the Court. And yet we say that we want this Court to exercise its high chancery powers to destroy this work, built under such circumstances, in our own presence, and almost at our invitation.

V.

We say further, that appellants are estopped both in equity and at law, because of their implied license. We need no words to prove a parol license. Conduct may be a parol license. If it were necessary to be under seal, as at common law, or in writing, to give a license as you would a *transfer* of an easement, then there could be no implication of it except that implication that results from a long

period of use, by the aid of what the law calls prescription, presuming a lost grant, or an original grant. But here we make no such suggestion as that. We say, from all the surroundings, the relations of the parties, their knowledge, the nature of the work, its public and private character, the notices that were had of it, the constructive and the actual notice that the appellants admit that they had of it, and the immense amount of money expended, its long progress of construction, its uses adopted to the development for the purposes of cultivation, of a desert, until it has become a garden spot, with large interests and divers people interested in it; that then, and then only, the appellants should be heard in a Court of Equity, is not an admissible proposition, but, on the contrary, this Court will hold that the respondents in the case acted upon an implied parol license which was an extinguishment of the easement, (as to them,) if any was ever held by appellants.

Unquestionably parol licenses may be revoked, even when given in terms, until executed; but the law is that they are irrevocable after execution. A man cannot, by his words, or by his conduct, induce another to undertake an enterprise at great cost, that may interfere with or disturb some right that he may have, or suppose himself to have, in

his presence, and let it go on to completion, and then talk about his right of revocation. It does not matter whether there is any consideration for it, the theory being that if it is without consideration he can revoke it before execution, but that, without other inducement, the consideration is perfect and absolute when, in good faith, the respondent has acted upon the license growing out of silence or acquiescence.

Washburne, in his Easements and Servitudes, 3d edition, page 26, says: "The doctrine that a "license is, under certain circumstances, revoc- "able, and under others not, is considered and "illustrated at length in *Veghte* vs. *Raritan Water* "*Power Company*. In that case the defendants "owned a parcel of land on both sides of a river, "suitable for erecting a dam. But if erected to a "certain height it would flow back upon the lands "of others. To gain a desired mill power in con- "nection with this dam, it was necessary to con- "struct a raceway from above the dam, through "the lands of several owners, to a point three "miles below it on one side of the stream. And "a license, in writing, but not under seal, was "granted to them by the owners above and below "the dam, to erect the dam to this height, to ex- "cavate the raceway and insert at its head, where "it left the river, headgates of the requisite height

"and width, and to draw the water through the "same. The dam was built to the prescribed "height and finished in 1842. In 1843, culverts "were made by which to let the water into the "raceway. The headgates had been constructed "before that, and had been washed out before the "culverts were put in. This dam and mill prop- "erty came by purchase into the defendants' "hands in 1864. The dam was leaky and wanted "repairs. The headgates had not been restored, "and the defendants were taking measures to "render the dam tight, so as to keep the water "higher than it had been accustomed to be; to "put in new and wider headgates, and enlarge the "culverts to let the water into the raceway, when "the owners above and below the dam prayed for "an injunction. One or more of the licensers "died in 1846, which had the effect, in the judg- "ment of the Court, to revoke the license, so far "as the same could be done, in respect to the "lands then owned by them, and now owned by "the plaintiff."

Your Honor will see, upon an examination of the case to which this refers, that the Court thought the license was revocable as to the unexecuted part of the work, and as to that alone. "The questions were: First, what, if anything, "passed by this license; and second, what was the

"effect of the revocation upon the rights which "had accrued under the license?" It was held, in the first place, that being a mere license and not a grant, nothing in the nature of a freehold easement passed, and that before it had been executed the licenser might have revoked it. In the next place, at common law, he might have revoked it, so far as it related to the licenser's land, even after it had been executed. But in equity, if the revocation would work a fraud upon the licensee it would be restrained, nor could it be revoked so far as it had been executed upon the licensee's land, either at law or in equity. There are various ways of revoking a license, and bringing a bill to restrain the act licensed from being done, would be one of them.

On page 97 he says: "And where the owner "of an estate has stood by and seen another ex- "pend money upon an adjacent estate, relying "upon an existing right of easement in the first "mentioned estate, and without which such ex- "penditure would be wholly useless and wasted, "and has not interposed to forbid or prevent it, "equity has enjoined him from interrupting the "enjoyment of such easement. So, where he has "by parol granted a right to such easement in his "land, upon the face of which, the other party has "expended money which will be lost and value-

"less if the right to enjoy such easement is re-
"voked, equity has enjoined the owner of the
"first estate from preventing the use of the ease-
"ment," referring to the authorities there—a large number of them—collected to his text.

The Court say, in the case of *Vechte* vs. *The Raritan Company*, 4 C. E. Green, 142–159: "In "general a license at law will create no estate in "the land of the licensor that will justify or ex-"cuse any act done under it. It is revocable "even when given for consideration and after it "has been executed, *at law.*" That was the decision in the leading case of *Wood* against *Leadbeater*, to which very much reference is made in a number of the authorities; and it will be found that all the authorities having any suggestion of the proposition that you can revoke a license after it has been acted upon, relate only to the power of revoking them at law, and that an equity court will always interpose to prevent its revocation, after execution.

This illustrates, if the Court please, that there is such a thing as a parol license in reference to the enjoyment of an easement. For instance, that the owner of the infra tenement—the dominant estate—who claims that the water shall flow by him unaltered and undiminished, can yield his

right *protanto* or entirely, by license, if he chooses to do it; and he may do it by parol, or he may do it by his conduct, upon which the Court would imply a license by tacit or active assent.

Now, in 7th Bingham, in the case of *Liggins* against *Inge*, page 690, the Court say:

"The argument on the part of the plaintiff has "been that such parol license is in its nature "countermandable at any time, at the pleasure of "the party who gave it. That to hold otherwise "would be to allow to a parol license the effect of passing to the defendant a permanent interest "in part of the water which before ran to the "plaintiff's mill; which interest, at common law, "could only pass by grant under seal, being an "incorporeal hereditament, and which at all events "could be determinable at the will of the grant-"or (since the Statute of Frauds) as being an in-"terest in, to, or out of lands, tenements, and "hereditaments. If it was necessary to hold that "a right or interest in any part of the water which "before flowed to the plaintiff's mill must be shown "to have passed from the plaintiff's father to the "defendant's under the license, in order to justify "the continuance of the weir in its original state, "the difficulty above suggested would undoubt-"edly follow; for it cannot be denied that the "right to the flow of the water, formerly belong-

"ing to the owner of the plaintiff's mill, could "only pass by grant—as an incorporeal heredita- "ment—and not by parol license. But we think "the operation and effect of the license, after it "has been completely executed by the defendant, "is sufficient, without holding it to convey any "interest in the water, to relieve them from the "burthen of restoring to its former state what has "been done under the license, although such li- "cense is countermanded; and consequently, that "they are not liable to an action, as wrong-doers, "for persisting in such refusal."

That is the language of the Court, Lord Tindall, Chief Justice, giving the opinion in that case.

Angell on Water Courses, pages 391, 392 and 393, discusses the same doctrine, and to the same effect.

Now, if this be the law, or rather if this be the equitable rule, and if it be true, as stated by one of the appellants in this case, that they knew all about the construction of this work—this proposed construction and its dimensions—if it be true that they must have known all about its progress, and the fact that it must have cost immense sums of money—I say that their silence was a tacit assent which would imply a parol license to construct it, and that outside of the question of equit-

able estoppel they are not in the position to assert any rights as against the respondents in this action.

Upon this point we say: It is practically admitted that our appropriation was made according to the requirements of the statute.

VI.

Now, the proposition we make to the Court is this: That the use of water for irrigation is a preferred use, that it is a reasonable use by a riparian proprietor, by the supra riparian proprietor at common law as against a lower proprietor; that the latter cannot complain of a diversion and a reasonable use—even under the doctrine of riparian rights as fully as appellants claim them—a use that is reasonable as to its purpose, unless he can combine two things. The first is, that his right is interfered with; and the other is, that it is wrongfully and unlawfully interfered with. If the use be reasonable, it is not unlawful; if it is for a preferred use, as irrigation is in this country, it is not an unlawful use, and he cannot be heard to complain of the use unless he shows damage by virtue of the quantity that is taken proportioned to the size of the stream. Now that is the law. There can be no authority found against that proposition. In the case of *Williams* against *Mor-*

land, 2d Barnwell and Cresswell's Report, page 913, upon this subject, the Court say: "I think "that this rule ought to be discharged. My judg- "ment in this case is founded on the nature of "flowing water, and the manner in which an ex- "clusive right to it is to be obtained. Flowing "water is originally *publici juris*. So soon as it is "appropriated by an individual, his right is co- "extensive with the beneficial use to which he ap- "propriates it. Subject to that right all the rest "of the water remains *publici juris*. The party who "obtains a right to the exclusive enjoyment of "the water does so in derogation of the primi- "tive right of the public. Now, if this be the "true character of the right to water, a party "complaining of the breach of such a right ought "to show that he is prevented from having water "which he has acquired a right to use for some "beneficial purpose."

It is necessary for him to show that he is entitled to the right which he is deprived of the privilege of using for a beneficial purpose, involving absolutely a question of damage.

In the case of the *Bear River Mining Company* against the *York Mining Company*, 8th California, the Supreme Court, Judge Burnett delivering the opinion, say: "The use of water for do-

" mestic purposes and for the watering of stock
" are preferred uses, because essential to sustain
" life. Other uses must be subordinated to those.
" In such cases the element is entirely consumed.
" Next to these may properly be placed the use of
" water for irrigation in dry and arid countries. In
" such cases the element is also entirely consumed.
" In a proper system of irrigation only so much wa-
" ter is taken from the stream as may be needed,
" and the whole is absorbed or evaporated. Entire
" absorption is the contemplated result of irriga-
" tion, when properly used," etc. Showing that it is regarded as among those uses which, as I will illustrate by authority to the Court, are called the adaptation of water to natural wants.

Now, in the leading American cases upon the doctrine of riparian rights, ~~to which the gentlemen have referred me, and~~ upon which ~~they now~~ I rely (4th Mason, *Tyler* against *Wilkinson*), Judge Story states the proposition thus: " The true test
" of the principle and extent of the use is, whether
" it is to the injury of the other proprietors or not.
" There may be a diminution or retardation or
" acceleration of the natural current indispens-
" able for the general and valuable use of the
" water, perfectly consistent with the existence of
" the common right. The diminution, retardation
" or acceleration not positively or sensibly injur-

"ious by diminishing the value of the common "right, is an implied element in the right of using "the stream at all. The law here, as in many "other cases, acts with a reasonable respect to "the public convenience and general good, and is "not betrayed into narrow strictures subversive "of common sense, nor the extravagant license "which would destroy private right." The maxim applied is, *sic utere tuo, ut alienum non lædas*—a maxim which is so often quoted in all the books, to illustrate that there must be some damage growing out of the proper or improper use.

The case of *Evans* vs. *Merriweather*, in 3d Scammon, 495, the Court say: "The supply of man's "artificial wants is not essential to his existence; "it is not indispensable; he could live if water "was not employed in irrigating lands or in pro- "pelling machinery. In countries differently sit- "vated from ours, in a hot and arid climate, water "doubtless is absolutely indispensable to the cul- "tivation of the soil, and in them water for irri- "gation would be a natural want. Here it might "increase the products of the soil, but it is by no "means essential, and cannot therefore be con- "sidered a natural want of man."

The evidence here is that the land was absolutely unproductive without water; a mere sage-

brush desert. The land to which the use of this water is applied was taken up as desert land—is desert land without irrigation. The above principle was declared in *Broder* against the *Natoma Water Company*, 11 Otto, and in *Emery* against *Aun*, in 6th Exchequer, page 353. A proprietor (whom we claim to be under the statute) has a right to use the water in any of those lines of use called a preferred use, to supply natural wants; and to use it in any quantity necessary to supply those natural wants. If, however, it had been illustrated to the Court in this case that the quantity we had used to supply the natural want of irrigation on the desert lands of Kern County had been so great as to damage appellants by disturbance of any use to which they had applied it, then they might have called upon the Court and asked ts interference, but that has not been done. *The claim for damage was withdrawn in the Court below.*

VII.

We pass now to the consideration of another proposition which alone, it seems to us, ought to be absolutely conclusive of this case in favor of respondents. It is this: The testimony shows to the Court, that if the appellants were ever riparian owners upon a water-course in the swamp land district 121, they have of their own motion

extinguished whatever riparian rights they had; not with reference, as we have been discussing, to the implied parol license to the defendant; but, because, as shown by the testimony of Mr. Souther, and as illustrated by all the testimony in this case, that they gave their assent—their unqualified approval, (Mr. Crocker says he did object to it at one time, but that the others, we suppose meaning his partners, overruled him, and that he was present with Souther and Parks at the time that the work was originally laid out). They consented that the Kern Valley Water Company, (who owned about the south line of section 15, near one mile south of the remotest southern point of the appellants' land), should construct there a levee across the entire swamp at that point. A levee which they describe as being 20 feet high in places. There is a roadway on top of it—a levee across this natural channel or watercourse, in the enjoyment of which, they say we are disturbing them. They consented to this in September, 1876. They have never had a drop of water since that time, except by accident or by the consent of Kern Valley Water Co.

See testimony of James Crocker, one of appellants, in Transcript vol. 2, pages 155 to 160, beginning at folio 617. Also testimony of William Souther, vol. 3, pages 165 and 166, commencing

at folio 659. And the testimony of S. W. Wible, vol. 2, folios 1830–31–32–33, and 1934–5.

That is the situation precisely. Appellants consented, in the presence of the work, to the construction of this levee and a canal at the end of the levee—an immense canal;—a canal, the company say, in its act of incorporation, constructed for the purposes of navigation as well as other purposes—a canal that when filled could float a steamer drawing several feet of water. That canal constructed as yet only 24 miles, projected towards Tulare Lake. This was done with their assent; together with the construction of the levee destroying this channel or water-course of Buena Vista Slough; this flowing stream, in the use of which at their banks they say we have disturbed them. No outlet is left, dammed up from one end of the swamp to the other, clear across, the canal diverting and taking out the entire water; and the canal company owning all the water that reaches there. Appellants do not pretend any relation of contract between them and the canal company. There is no pretense that they have got any interest in the property or works of the company. There is no suggestion here that Miller, Lux and Crocker have a share, or have control or interest in this canal company in such a way as to make

them identical—to make the canal company the same as the appellants in this action.

On the contrary, it is asserted all the time, that they are not interested in the Kern Valley Water Company's canal; and under the facts here—and there is no dispute about the facts upon this proposition—the canal was constructed with appellants' assent, and with their encouragement. The levee was built, the natural channel destroyed. the canal constructed for the purpose of diverting, not a portion, not a part of the waters of Kern River, as they call it, running down this Buena Vista Slough, but every drop of water that would reach the swamp if the Calloway and every other canal were stopped and all the water were turned in. Now, what is the law of this case?

I read from Washburne's Easements and Servitudes, without referring to special authorities, page 679, 3d edition: "In some of the cases "which have been referred to, the rulings of the "Court might have been sustained upon what has "now become well settled law, that if the owner "of the dominant estate do acts thereon which "permanently prevent his enjoying an easement, "the same is extinguished; or, if he authorized "the owner of the servient estate to do upon the "same that which prevents the dominant estate

"from any longer enjoying the easement, the "effect will be to extinguish it." "This doctrine "does not extend to what are called natural ease- "ments, like the flow of a stream of water through "the licensee's lands into that of the licenser. A "license to stop or divert it upon the licensee's "lands is just as revocable as if the act was to be "done upon that of the licenser, since its effect is "to create an easement upon the licensee's land, "and not the giving up of one which belongs to "to the licenser in the licensee's land." Revocable at law, not in equity Going on to show, as I have already illustrated, in referring to the case, in 4 C. E. Green, that a revocation may be before execution, but not where it would work a fraud. Referring to the case of *Liggins* vs. *Inge*, the author says: "The same doctrine is again re- "peated in *Dyer* vs. *Sanford*, which related to an "obstruction of an easement of light and air, by "an erection by the owner of the servient estate "upon his own land, by the license and permis- "sion of the owner of the dominant estate. It "results from the consideration that a license, "when executed, is not revocable, and if the ob- "struction be permanent in its nature, it does, *de* "*facto*, terminate the enjoyment of the easement."

Now, in codifying the laws of California, there was an effort made to conform, I suppose, to what

were the well known principles and rules of Equity Courts. And in Sec. 811 of the Civil Code of California, Subdivision 3, we find: "*A servitude is extinguished*, first, by the "vesting of the right "of the servitude and the right of the servient "tenement in the same person; second, by the "destruction of the servient tenement; *third by "the performance of any act upon either tenement by "the owner of the servitude, or with his assent, which "is incompatible with its nature or exercise.*"

Thus, the Code says, the parol license extinguishes appellants' riparian interest. They have none left. In this case owners of a dominant estate by parol permit the extinguishment of the servitude by the owner of the servient estate, telling him: "While you are under service to us "to permit this water to pass your bank and down "to ours, we authorize you to obstruct this chan-"nel. We might have done it ourselves upon our "own land, or with your consent, we might have "done it on your land, and still have claimed our "easement. But we authorize you to do it before "the stream reaches our land; to dam it up; to "construct a levee across it; to make upon the "levee across it a traveled roadway"—a county road, I believe it is, or something of that sort. "Dam it up, construct a levee, make your canal, "and take all the water that comes there, and

"own it. If I am to get any, it shall be at your "will."

Now, that is the case from the evidence. What have appellants got left, even if the doctrine of riparian rights, as claimed by them is enforced? If this swamp is a water-course—if this occasional surplusage from Kern and Buena Vista lakes is a water-course, or Kern River, which we have diverted some twenty miles above them—if that is all true, the prayer of their petition is this: That the Court will force us to stop diverting the water at the head of the Calloway Canal, and permit that water to come down and become the property, absolutely, of the Kern Valley Water Company. We say the appellants by the testimony—the undisputed testimony—have no interest whatever in it—it is not theirs. It is true the water breaks through accidentally, on the sides of the canal, sometimes. It is true that, as yet, only twenty-four miles of the canal are completed, and it breaks out and goes towards Tulare Lake. But appellants have no contract for the Kern Valley Water Company to supply their wants, so far as we are informed from the evidence—they are not the corporation; they are the private owners of the swamp land; they own the banks (they claim). and intend to double-deal about it.

That is the case. It is, in a nutshell—simple,

plain, indisputable. There is not the slightest testimony that they are entitled to any of the water—no pretense of it.

All the testimony shows, in every form, a consent by appellants to the diversion of all the water by the Kern Valley Water Company.

Appellants come into a Court of Equity and say that they are riparian owners, in defiance of the laws of this State, and of the common law which knew no such right. They come here and say: they are upon a water-course with a defined channel, where the water usually flows, and complain that we have diverted it. And they tell the Court that it is the water-course of Kern River; they tell the Court, from the testimony: We know where the natural flow of Kern River is; we know that it is in Buena Vista and Kern lakes; we know that that is the final discharge of the waters of Kern River, and we know that those lakes are the reservoir of the waters of an immense tract of country in its drainage, besides that coming into it from Kern River. We know that even under the artificial obstruction which we ourselves have made, or which, through our connivance with others, have been constructed, still no water of Kern River ever reaches near us except by accident—except by the result of the backbone form-

ed by the debris about Cole's Dam, turning the water and causing it partially to flow down, not to us, but to the Kern Valley Water Company. We know all this. We admit it by the testimony. We know that these defendants, undertook and completed their great enterprise with the knowledge of all these facts—with the knowledge from the testimony that it would benefit us if they diverted as much water as possible, with the knowledge that it would have been a blessing if they could have taken it all down Goose Lake Slough —with a knowledge of the fact that the dry seasons are the seasons for our uses for the benefit of our cattle—with a knowledge of the fact that we not only have not been damaged, which we admit, but benefited, which our testimony and theirs has shown. We ask the Court, (admitting that we witnessed and had knowledge of the commencement of the work on the Calloway Canal, and that we watched perhaps enviously and covetously its construction until we have seen it completed, and have seen tens of thousands of acres of the desert sprouting with the growth of a fruitful soil from the result of this application of water diverted by defendant), we ask the Court to destroy respondents' work. We have seen respondents begin its enterprise. We never protested. We have given no notice of objection. We gave no such notice when the construction of the canal began. We

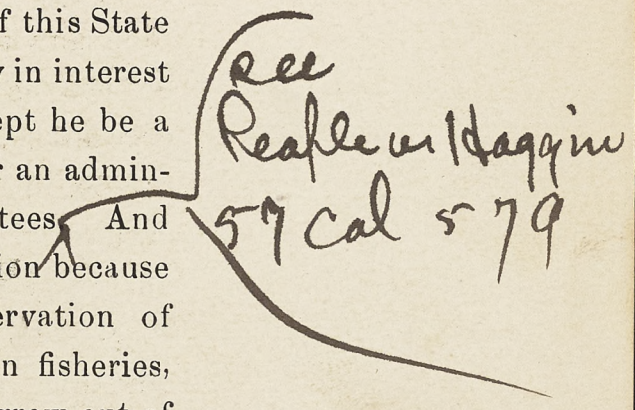
gave no such notice when the respondents began the diversion of the water. We gave no notice at any period of the progress of the work. We waited until the work was done. We waited until it was too late to take back the purpose. We waited until immense interests had grown up around the work, and were developed by it. We waited until we thought we had a chance to advantageously shake the arm of power, through the instrumentality of this Court, over the respondents. We knew it had money and thought we would make it shell out. That is what we waited for, and we come now with clean hands and clean hearts into a Court of Equity and ask the Court to make it do so. We tell the Court: It makes no difference really whether it grants our prayer or not; we not only never have been hurt, but we never can, possibly, be hurt.

Not only has the diversion of this water benefited us practically and in fact, but we have no longer any rights. We have not had any since September, 1876. We do not even dare to assert them as against the party whom we have permitted by our license to take our rights from us. It is not the business of this Court what sort of a trade we have made with the Kern Valley Water Company. We have no interest in this water any longer. Whatever there was of a natural stream

we ourselves have destroyed by our consent to its destruction (by the Kern Valley Water Company). Whatever easement we had has been extinguished by our own action. Whatever may have been our rights to the water reaching the Buena Vista Slough above our land we have yielded to a third party who is not a party in this case. But we want this Court to give us relief. Relief from what? It is *reductio ad absurdum.*

But appellants may say: *We* must sue; those holding under us are our licensees; they cannot sue; *we* must.

Now, in the first place, the statute of this State says exactly the other way. The party in interest is the only proper party to a case. except he be a trustee under certain circumstances, or an administrator, or executor, who are but trustees. And again, the rule would have no application because it grew up out of suits for the preservation of easements, in public or private ways, in fisheries, in the enjoyment of those things that grew out of an interest in and depended upon the land, and the enjoyment of which necessitated the temporary occupation of the real estate; and the holder of the title only, could bring an action for trespass. But here the law says: that the right of



the appellant is extinguished by his own act; the servitude is lost by the joint ownership of the easement and the servient tenement (the former merged in the latter). It has no connection any longer with the realty owned by the appellants, nor is any such pretense apparent upon the pleadings. Appellants do not come here sueing as trustees for somebody else, that is not the idea of the appellants. The Kern Valley Water Company is not estopped in any mode by this proceeding, if we are disturbing any of *its* rights. We don't know whether they owned the land at the point of diversion or not; the presumption is that they or the government do. The Kern Valley Water Company are in possession, at any rate. They are not estopped from proceeding against us by this proceeding, upon the face of the pleadings—could not be, in fact. They claim nothing out of the ownership of the land of appellants. They claim no privity with them in the right to the easement. They claim merely to have been released from the servitude; that is all. Not a privilege granted upon the lands of the appellants, but a release from a servitude growing out of the relation by locality upon the stream of their lands towards those of appellants. So that that suggestion is uttterly futile. Nor was it needful that we should plead this extinguishment of appellants' easement,

if they ever had it. We do not justify under a license to us.

Respectfully submitted,

FLOURNOY, MHOON & FLOURNOY,

Of Counsel for Respondents.

Service of the within by copy, admitted this 5th day of Dec. 1883.

Stetson & Houghton

Attorneys for Appellants.